IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 335

AETNA INSURANCE COMPANY,
Petitioner,

—against—

ROBERT C. JEFFCOTT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

AETNA INSURANCE COMPANY, petitioning this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit against respondent, Robert C. Jeffcott, respectfully shows:

Statement of Matter Involved.

This is a suit in Admiralty instituted by the respondent in the United States District Court for the Southern District of New York to recover the sum of $320,000, being the face amount of two policies of insurance on the Yacht "Dauntless", together with additional sue and labor expenses of upwards of $12,000.

The facts, so far as concerns this petition, are not in dispute and are as follows:

On June 7, 1938, the petitioner issued to the respondent two policies of insurance on the Yacht "Dauntless", cover-

ing for a period of one year from June 24, 1938. One policy was in the sum of $240,000 on the yacht hull form covering partial as well as total losses and in it the vessel was valued at $240,000 (R., p. 21, *et seq.*). The other policy, in the sum of $80,000, insured against total loss only and was on the disbursements form (R., p. 35, *et seq.*). Each policy expressly warranted that the Yacht should be—

> "laid up and out of commission at the Thames Shipyard, New London, Connecticut, during the currency of this policy" (R., fols. 76, 118).

and each policy provided:

> "The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss" (R. 25, 39).

On September 21, 1938, the "Dauntless", while completely withdrawn from commerce and navigation and laid up and out of commission in accordance with the warranty above quoted, was torn from her moorings by the hurricane which occurred that day, was washed inshore and came to rest in shallow water, with her bow lying on the hulks of certain old barges. She sustained practically no damage to her hull, but the elaborate and costly paneling, woodwork and fittings with which she was equipped were ruined and her electrical equipment was largely damaged by water which entered her interior through the rudder port in the stern, which was open at the time, as the rudder had been removed for renewal.

Eight days after the hurricane the respondent tendered abandonment to the petitioner on the sole ground that the damage to and cost of salvage of the Yacht amounted "to more than half her insured value of $240,000" (R. 4756-4758). The tender of abandonment was immediately rejected by petitioner (R. 4759); and nearly a year later, namely one day before the expiration of the year-for-suit clause in the policies, this suit was instituted in admiralty. The libel (R. 17, 18), like the tender of abandonment, was based on the theory that the respondent was entitled to

recover $320,000 (the face amount of the policies) because the cost of salvaging and repair allegedly exceeded $120,000, or half of the insured value in the hull policy. The petitioner was at all times ready and willing to pay the actual cost of repairing the yacht and restoring her to her original condition, and only resisted the respondent's demand for nearly $200,000 in excess of the actual damages.

The petitioner filed exceptions to the libel on two grounds, only one of which is here material, to wit, that since the Yacht was warranted laid up and out of commission at New London, Connecticut, during the policy term of one year, and was actually so laid-up, the so-called "50% rule", under which an assured can, in certain circumstances, claim a constructive total loss where the cost of recovery and repair exceeds half the value, had no application (R. 121-126). The petitioner's position, maintained throughout the litigation, is that the so-called "50% rule" has only been applied, and as a matter of legal principle can only be applied, where the vessel, at the time of a disaster and tender of abandonment, is on a voyage or is distant from her home port or the port where she is warranted to be kept during the policy term. The exceptions to the libel on this ground were overruled by the District Court (R. 153) with an opinion (R. 132-150), and the Circuit Court of Appeals later affirmed. The principal authority on which the petitioner relied in this regard was the case of *Pezant et al.* v. *The National Insurance Company*, 15 Wendell (N. Y.) 453, a case which both the District Court and the Circuit Court of Appeals refused to follow, although it was binding on them under the rule laid down by this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and *Just et al.* v. *Chambers, Executrix*, 312 U. S. 383.

Following the overruling of the exception to the libel, an answer was filed by petitioner, which admitted the admiralty jurisdiction alleged in the libel. Prior to the trial petitioner moved to amend the answer to deny admiralty jurisdiction and for a dismissal of the libel on the ground of lack of such jurisdiction. The amend-

ment was granted, but the dismissal was denied (R. 240-246), and the decision of the District Court was later affirmed by the Circuit Court of Appeals. The answer admitted that petitioner was liable for all damage sustained by the yacht in the hurricane, and alleged that the yacht was not a constructive total loss because (*inter alia*), the damage was less than the full insured value.

The District Court, following a full trial, found that the cost of salvaging and repairing the vessel was $150,399.18, and that the vessel was a constructive total loss because that sum exceeded half her insured value. A decree was entered against petitioner for $320,000 with interest, and for sue and labor charges to be fixed by a Commissioner. The sue and labor charges have since been fixed by stipulation. The decree was affirmed by the Circuit Court of Appeals for the Second Circuit.

The Questions Presented.

The questions presented are:

1. Are policies of insurance on a vessel which is wholly withdrawn from commerce and navigation and which is laid up and out of commission and warranted so to continue throughout the term of the policies, maritime contracts, and does admiralty have jurisdiction of a suit based on such policies? If not, petitioner has been deprived of the jury trial to which it is entitled; and (through the court's refusal to apply the rule of *Erie Railroad Company* v. *Tompkins*), has been deprived of the benefit of well settled legal principles which would apply on the law side.

2. Should the so-called "50% rule", under which a constructive total loss is payable on a policy covering a vessel where the cost of recovery and repair exceeds half the insured value, be extended to the case of a vessel which is not on a voyage or at a distant port, but which is at all times in the possession of the owner, in the port where her owner has laid her up and where the parties

have agreed that she shall remain laid up and out of commission throughout the term of the contract? If not petitioner has been held liable for more than twice the amount properly due under its policy.

3. Should the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383, have required the courts below to apply to this case the state law as laid down in *Pezant* v. *The National Insurance Company*, 15 Wendell (N. Y.) 453, a case which the courts below held to be in point, but which they refused to follow? If not, then *Swift* v. *Tyson* is again law in the important commercial field of marine insurance.

Reasons for the Allowance of the Writ.

1.

(a) The decision of the Circuit Court of Appeals for the Second Circuit in this case, holding that a contract of insurance on a vessel which is completely withdrawn from commerce and navigation and is warranted to be and in fact is laid up and out of commission, is in direct conflict with the principles laid down by this Court in the following cases in which this Court held that a maritime contract, to be such, must be directly and immediately connected with navigation and commerce by water, and that admiralty had no jurisdiction over a non-maritime contract: *People's Ferry Company of Boston* v. *Beers, et al.*, 20 How. 393; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 26; *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 125; *Thames Co.* v. *The Francis McDonald*, 254 U. S. 242, 244.

(b) The decision is in direct conflict with the decisions of the Fifth and Seventh Circuit in the following cases, which hold that a contract having to do with a vessel which is laid up and withdrawn from navigation, is not maritime and therefore not subject to admiralty jurisdiction: *J. C. Penney-Gwinn Corporation* v. *McArdle*, 27 F. (2d)

324 (C. C. A. 5); certiorari denied 278 U. S. 632; *Kibadeaux* v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5); certiorari denied 299 U. S. 549; *In re Hydraulic Steam Dredge No. 1*, 80 Fed. 545 (C. C. A. 7); *The Richard Winslow*, 67 Fed. 259; affirmed 71 Fed. 426 (C. C. A. 7).

(c) The decision is in direct conflict with the decision of the Seventh Circuit in *North German Fire Insurance Co.* v. *Adams*, 142 Fed. 439, which held that the test of whether a policy of insurance was a maritime contract was whether it covered a ship engaged in commerce or navigation, not whether it insured against perils of the sea. In the case at bar, the court held that the policy is a maritime contract if it insures against sea perils, regardless of whether the insured vessel is engaged in commerce or navigation. The decision herein is likewise in conflict with the decision of this Court in *Cope* v. *Vallette Dry Dock Company*, 119 U. S. 625, holding that a floating dry dock could not be the subject of maritime salvage, since it was not used for purposes of navigation or commerce, although the peril which made the salvage necessary (*i. e.*, collision with a moving vessel as a result of which the dry dock was in danger of sinking) was a typical marine peril.

2.

Insurance is a contract of indemnity, not of enrichment. The "50% rule", under which a vessel owner may recover for a total loss where his ship is damaged more than half of her value is an exception to the rule of indemnity. It has been repeatedly criticized by the courts, which have consistently refused to extend its application beyond its strict historical limits. The courts below, by extending the "50% rule" for the first time to a vessel which was not on voyage or engaged in any maritime adventure, have made the rule a vehicle of unjust enrichment. Furthermore, the decision below greatly extends the scope of an exceptional American doctrine which has never had any existence under English law, and in this respect

the decision is out of harmony with the statement by this Court that:

> "There are special reasons for keeping in harmony with the maritime insurance laws of England, the great field of this business * * *." *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*), 263 U. S. 487, 493.

3.

The decisions below flatly disregard the rule of *Erie Railroad* v. *Tompkins*. The Circuit Court of Appeals recognized that the New York law was as stated in *Pezant* v. *National Insurance Co.*, 15 Wend. 453, a case which has the approval of Phillips on Insurance and which has never been overruled or questioned. The Circuit Court of Appeals refused to follow the *Pezant* case because it disagreed with its holding. It is respectfully submitted that the rule of *Erie Railroad* v. *Tompkins* should not be whittled away in this manner.

The Importance of the Questions Involved.

1. This Court and the lower Federal Courts have rendered many decisions defining and limiting the admiralty jurisdiction conferred on the Federal Courts by the Constitution. From the earliest times this Court has ruled that only maritime contracts are the subject of admiralty jurisdiction and that only contracts "directly and immediately connected with navigation or commerce by water" are maritime. As will be pointed out in the brief in support of this petition, this Court and the lower Federal Courts have uniformly held that *no* contract dealing with a vessel which has not yet been dedicated to commerce and navigation, or which has been withdrawn from commerce and navigation, is maritime in its nature. In pursuance of this rule, this Court and the lower Federal Courts have repeatedly held that a contract is not maritime which deals with the construction of a new vessel, with the storage of goods on a laid-up vessel, with wharfage furnished to a laid-up vessel, with watchman service to a laid-up vessel, or with the furnishing of necessary supplies

to a laid-up vessel. And as will be pointed out in the brief, this Court, in *Insurance Co.* v. *Dunham*, 11 Wall. 1, held that a policy of marine insurance on a vessel was a maritime contract only because it covered while the vessel was engaged in commerce and navigation.

The decision below strikes at the very roots of the established rule that no contract in regard to a vessel which is withdrawn from commerce and navigation and laid up can be maritime in its nature. It creates and applies a rule for determination of whether or not a contract is maritime which is diametrically opposed to the rule uniformly adopted for the past one hundred and fifty years. It is respectfully submitted that a fundamental change in the entire basis of admiralty jurisdiction in matters of contract should not be had without the sanction of this Court.

2. The decision below that the so-called "American 50% Rule" is no longer subject to the qualifications which have been attached to it from the earliest times, will create intolerable confusion in the field of marine insurance. The 50% rule, in its origin and history, applies equally to ship and cargo. As to both it has always been subject to the definite qualification that it applied only where abandonment was necessary to relieve the assured of the risk and uncertainty involved in completing a voyage which might well prove unprofitable because of heavy damage already sustained. The doctrine had its origin in the early days when ocean commerce was carried on with sailing vessels, when communication was slow and the provision of funds in a distant port of distress might be extremely burdensome. If the decision below applies to cargo as well as to hull (and no distinction between them has ever been drawn), it follows that an assured may not only abandon a vessel in her home port when she is damaged slightly more than 50% but for the same reason he may abandon cargo which has arrived at destination. Such results are squarely contrary to a long line of decided cases, and are wholly unsupported by any authority. The decision below expands the scope of an

exception to the ordinary rule of indemnity so that the exception is, in effect, substituted for the rule.

3. The case of *Erie Railroad* v. *Tompkins, supra,* determined that state decisions were binding on the Federal courts, *inter alia,* in matters of commercial law. Policies of marine insurance are commercial documents (*Thames & Mersey Marine Insurance Co.* v. *United States,* 237 U. S. 19), and they accordingly lie in a field covered by *Erie Railroad* v. *Tompkins.* The rule of that case should not be narrowed and whittled away as has been done by the lower courts in their refusal to follow New York law in a case involving marine insurance. It is clear that the application of state court decisions to the subject of marine insurance would not destroy or prejudice the essential uniformity of the admiralty law; certainly no such prejudice could result in a case like the present, where the subject matter of insurance is wholly withdrawn from and unrelated to commerce and navigation.

WHEREFORE petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit directing it to send to this Court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled: Robert C. Jeffcott, Libellant-Appellee, against Aetna Insurance Company, Respondent-Appellant, No. 265 and that the decision of the said Circuit Court of Appeals rendered on the 15th day of July, 1942 and the decree of the District Court entered on the 17th day of July 1941 (R., pp. 1941-2) be reversed and for such other relief in the premises as may be just.

Dated, New York, August 22, 1942.

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BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court is officially reported in 40 F. Supp. 404; the opinion, findings of fact and conclusions of law are printed in the Record (R., pp. 1885-1909), and the opinion of the Circuit Court of Appeals filed July 15, 1942, not yet officially reported, is printed at pages 1932 to 1941 of the record.

Jurisdiction of This Court.

This is a suit in admiralty by respondent against petitioner for the recovery of the face amount of two policies of insurance on the Yacht "Dauntless", which was damaged in the hurricane of September 21, 1938. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347.

The Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

There is no admiralty jurisdiction over the subject matter of this suit. The Circuit Court of Appeals in holding that admiralty had jurisdiction, has violated settled principles uniformly followed by this and all other federal courts since the adoption of the Federal Constitution.

The Circuit Court of Appeals disposed of the question of admiralty jurisdiction rather casually by treating it as a mere matter of nomenclature. The Court said (R., pp. 1933-4):

> "Both parties agree that admiralty jurisdiction over contracts exists when the subject matter of the contract is maritime. It is also agreed that the subject matter of marine insurance is maritime. *De Lovio* v. *Boit*, C. C. Mass., 7 Fed. Cas. 418, No. 3776; *New England Marine Ins. Co.* v. *Dunham*, 11 Wall. 1, 20 L. Ed. 90. Accepting these labels as counters for decision, the question then is whether this insurance policy is a policy of marine insurance."

And the Court then pointed out that since the policy here involved insured against marine risks, it was a policy of marine insurance and therefore a maritime contract over which admiralty had jurisdiction.

The opinion of the Circuit Court of Appeals is perhaps the first instance in which the matter of admiralty jurisdiction under Article III §2 of the Constitution has been decided on the basis of nomenclature, using "labels as counters". And one of the "labels" which the Court used was counterfeit, as will be seen from a brief glance at the decisions of this Court which have defined the limits of admiralty jurisdiction.

The test and the sole test of admiralty jurisdiction in a suit on a contract is whether the contract is maritime in nature, *i. e.*, whether it relates to the "navigation, business or commerce of the sea".

Peoples Ferry Company of Boston v. *Beers, et al.*, 20 How. 393, 401;
The Belfast, 7 Wall. 624, 637;
Insurance Co. v. *Dunham*, 11 Wall. 1, 26;
The Eclipse, 135 U. S. 599, 608;
North Pacific S. S. Co. v. *Hall Bros. Co.*, 249 U. S. 119, 125;
Thames Co. v. *The Francis McDonald*, 254 U. S. 242, 244;
De Lovio v. *Boit*, Fed. Cas. #3776.

In *The Francis McDonald, supra,* this Court said that a contract, to be maritime in nature, must be—

> "directly and immediately connected with navigation or commerce by water."

Obviously a contract can be directly and immediately connected with navigation and commerce by water only when it relates to a ship engaged in commerce or navigation, or to cargo or passengers transported by water. All Federal courts heretofore have uniformly so held.

The subject matter of the policies of insurance here in suit was a ship, but a ship which was not engaged in navigation or commerce. It was a ship which had been withdrawn from all commerce and navigation, and which was (and by the terms of the contract in suit was bound to remain) laid up and out of commission.

Prior to the decision herein, and with the exception of two cases in the Fifth Circuit, in one of which the point was not raised and both of which must be considered overruled by the later case of *Kibadeaux* v. *Standard Dredging Co.*, 81 Fed. (2nd) 670, cert. denied in 299 U. S. 549, no contract in regard to a ship which was withdrawn from navigation, laid up and out of commis-

sion, has ever been held to be a maritime contract or subject to admiralty jurisdiction. On the contrary, the federal courts have uniformly and consistently held that *all* contracts having to do with laid-up vessels are non-maritime, because in their very nature such contracts cannot be directly and immediately connected with navigation or commerce by water.

Thus a contract for storage of goods on a vessel which is withdrawn from navigation and laid up, is not a maritime contract, and admiralty has no jurisdiction over it.

> *Pillsbury Flour Mills Co.* v. *Interlake Steamship Co.*, 40 Fed. (2d) 439 (C. C. A. 2); cert. denied 282 U. S. 845;
> *The Richard Winslow*, 67 Fed. 259; aff. 71 Fed. 426 (C. C. A. 7).

In the *Pillsbury* case the Circuit Court of Appeals for the Second Circuit, relying very largely on the decision of the Circuit Court of Appeals for the Seventh Circuit in *The Richard Winslow*, held that the admiralty courts had no jurisdiction over the relations between ship and cargo during a winter layup which was preceded and followed by actual transportation. Counsel for the petitioners in the present case, who represented the libellant in the *Pillsbury* case, applied (unsuccessfully) to this Court for a writ of certiorari, believing that the decision imposed an improper limitation on the admiralty jurisdiction. If the rule laid down in that case is good law (as presumably it still is in the Seventh Circuit) it is certainly impossible to support the present decision where the contract in suit did not,—and under its terms could not,—have any relation whatever to transportation or navigation.

A contract for the furnishing of wharfage to a vessel which is withdrawn from navigation and laid up, is not maritime and admiralty has no jurisdiction over it.

> *The Murphy Tugs*, 28 Fed. 429;
> *The C. Vanderbilt*, 86 Fed. 785, aff'd 93 Fed. 986 (C. C. A. 2);

Beard v. *Marine Lighterage Corp.*, 296 Fed. 146;
The William Leishear, 21 F. (2d) 862;
The General Lincoln, 24 F. (2d) 441;
Hughes on Admiralty (2nd Edition), 22.

A contract by which persons are hired to safeguard and care for a ship which is withdrawn from navigation and laid up, is not maritime, and admiralty has no jurisdiction over it.

The Sirius, 65 Fed. 226;
The Fortuna, 206 Fed. 573;
The Erinagh, 7 Fed. 231;
Hughes on Admiralty (2nd Edition), 22.

A contract for the use of a vessel which has been withdrawn from navigation, is not maritime. Thus a contract for the use of a vessel as a floating hospital or quarantine station is not maritime. *City of Detroit* v. *Grummond*, 121 Fed. 963, 971 (C. C. A. 6). Nor is a contract under which a barge is chartered for use as an adjunct to a pier. *W. F. & R. Boatbuilders* v. *Hudson River Steamboat Co.*, 9 Fed. Supp. 932.

A contract for the furnishing of necessary supplies to a vessel not engaged in navigation or maritime work, is not a maritime contract.

In re Hydraulic Steam Dredge No. 1, 80 Fed. 545 (C. C. A. 7);
J. C. Penney-Gwinn Corporation v. *McArdle*, 27 F. (2d) 324 (C. C. A. 5); Cert. denied 278 U. S. 632;
Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5); Cert. denied 299 U. S. 549.

A contract for the building of a ship is not maritime and admiralty has no jurisdiction over it. The reason is that a ship, while in process of construction, is not engaged in commerce or navigation. In *Thames Company*

v. *The Francis McDonald*, 254 U. S. 242, 244, this Court stated that—

> "* * * contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water."

How can a policy of insurance be considered as "directly and immediately connected with navigation or commerce by water", where the vessel it covers is withdrawn from navigation, laid up and out of commission, and where the policy warrants that this condition shall continue as long as the policy remains in force?

In its opinion herein the Circuit Court of Appeals brushes aside all of the cases above cited (including two of its own decisions) on the ground that the distinctions which those cases draw—

> "between ships engaged in active service and ships laid up * * * are generally unreal."

Whether the distinction is real or synthetic, it is one which all courts, up to the present decision, have followed without deviation, and which has its roots in the basic principle which this Court has laid down and consistently adhered to, namely, that no contract can be maritime in nature (and therefore the subject of admiralty jurisdiction), unless it is

> "directly and immediately connected with navigation and commerce by water."

That principle, so often affirmed and reaffirmed, and heretofore so rigidly adhered to, should not be jettisoned without the sanction of this Court.

Two further points should be mentioned.

1. The Circuit Court of Appeals, in its opinion herein, stated that any policy which insures against marine risks is a policy of marine insurance and that "the subject

matter of marine insurance is maritime". Arguing from these two premises, it reached the conclusion that all policies insuring against marine risks are maritime contracts.

This argument and the conclusion to which it leads are demonstrably unsound, both as a matter of principle and of authority. A marine insurance policy, of course, insures against perils of the sea; but every policy insuring against perils of the sea is not a maritime contract. Bridges, wharves, piers and other structures which this Court has held to be not the subject of admiralty jurisdiction, are constantly insured against "perils of the sea". A policy of insurance covering a wharf or a bridge is certainly a "marine insurance policy" if the test is the perils insured against; but no one could conceivably argue that such a policy was a "maritime contract", since its subject matter (a wharf or bridge) is not and in its nature can not be "directly and immediately connected with navigation or commerce by water", any more than could the floating dry-dock involved in *Cope* v. *Vallette Dry Dock Company*, 119 U. S. 625.

A policy of insurance on a ship is or is not a maritime contract, according to whether the ship is or is not engaged in commerce and navigation. The question of perils which the policy insures against is wholly beside the point. This was specifically held by the Circuit Court of Appeals for the Seventh Circuit in *North German Fire Insurance Company* v. *Adams*, 142 Fed. 439. There a navigating vessel was insured against *fire only*. The Court held that because the policy covered a vessel engaged in commerce and navigation it was a maritime contract, in spite of the fact that it insured only against fire. The Court said (p. 441):

> "The insurance contract is maritime when it has 'reference to maritime service' or transactions, and the subject matter of this policy is insurance, upon a vessel in such service, and is equally within the definition, whether the insurance covers one or all of the risks of the service."

The risks insured against, not being the *subject matter of the contract,* have nothing to do with whether or not the contract is maritime. The decision of the Circuit Court of Appeals for the Second Circuit in the present case is in direct conflict with the decision of the Seventh Circuit Court of Appeals in *North German Fire Insurance Company* v. *Adams.*

Many buildings on or near the seashore are insured against damage by the sea. It would scarcely be argued that the Admiralty courts had jurisdiction over such insurance, and yet this result necessarily flows from the decision of the present case.

2. The Circuit Court of Appeals in the opinion in the present case wholly misconstrued the decision of this Court in *Insurance Company* v. *Dunham,* 11 Wall. 1. In that case this Court was dealing with a policy of insurance covering a vessel *actually engaged in navigation and commerce.* This Court was careful to limit its decision to "the contract of marine insurance as set forth in the present case" and held that the contract was maritime in its nature because the subject matter was a vessel actually engaged in commerce and navigation. This is wholly clear from the opinion of the court when read in its entirety, as well as from specific statements on pages 26, 29 and 30 of the opinion.

The decision in the present case sweeps aside all tests of admiralty jurisdiction heretofore applied by this Court and by the lower federal courts throughout the country. It sets up in their place a new and heretofore unknown test which substitutes nomenclature for legal principle. If the entire basis of admiralty jurisdiction in matters of contract is to be changed, such change should be had only with the sanction of this Court.

POINT II.

The Circuit Court of Appeals misconceived the scope of the so-called "American Rule" in regard to constructive total loss. Its decision not merely extends the rule to a field which it has never heretofore embraced, but makes it an instrument of unjust enrichment.

In England, from the earliest times, a vessel or cargo owner could abandon to his underwriter and claim a constructive total loss only where the damage was so extensive that the cost of recovery and repair exceeded the repaired (or agreed) value. The English rule is now codified as §60 of the Marine Insurance Act, 1906. (The Act is printed as an appendix to Arnould on Marine Insurance and Average.) It is based on the principle of indemnity, and under it an assured cannot recover more than his actual loss.

In the United States the *quantum* of damage required for a constructive total loss was first mentioned in 1795 in a cargo case. In *Fuller* v. *McCall*, 1 Yeates (Pa.) 464, it was argued that if the damage to cargo exceeds 50% of the value, the assured might abandon and claim a constructive total loss. The argument was supported by a reference to the then existent French law in regard to cargo. (Le Guidon, C. 7, Art. 1.) In 1799 a New York Court laid down this rule as to cargo in *Gardner* v. *Smith*, 1 Johns. Cas. 141.

In 1814 this Court held that the 50% rule was applicable, in the case of cargo insurance, *where the cargo was damaged short of destination.* In *Marcardier* v. *Chesapeake Insurance Co.*, 8 Cranch 39, this Court said:

> "It seems now clear, that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained *at an intermediate port of necessity, short of the port of destination.* * * *" (Our italics.)

Ever since the decision in the *Marcardier* case it has been settled law in this country that the 50% rule applies only to those cases in which the damage occurs and abandonment is tendered *short of destination.* Where the insured cargo or any material part thereof arrives at destination, no abandonment having meanwhile been tendered, recovery for a constructive total loss is never allowed unless the cost of recovery and reconditioning exceeds the *entire* reconditioned or agreed value.

Forbes v. *Manufacturers Insurance Co.,* 1 Gray (Mass.) 371, 375;
Pierce v. *Columbian Insurance Co.,* 14 Allen (Mass.) 320, 322;
Merchants Mutual Ins. Co. v. *New Orleans Mut. Ins. Co.,* 24 La. Ann. 305, 307;
Seton v. *Delaware Insurance Co.,* 21 Fed. Cas. #12675;
Wallerstein v. *The Columbian Insurance Co.,* 44 N. Y. 204;
Parsons on Marine Insurance, Vol. II, p. 159.

The "American rule" in regard to the *quantum* of damage requisite for a constructive total loss under a policy on the *hull* of a vessel, grew out of and is identical with the rule in cases of *cargo* insurance. (*Ruckman* v. *Merchants' Louisville Ins. Co.,* 5 Duer 342, 362.) An examination of the authorities will disclose that in every case where the 50% rule has been applied, the vessel has been damaged and abandonment tendered while she was at sea or while in a distant port.

On the other hand, wherever the damage occurred when the vessel was in her home port or its equivalent, or the tender of abandonment was made after the vessel's arrival at that port, recovery for constructive total loss has been permitted only if the cost of recovery and repair exceeded the *entire* repaired or insured value.

A case precisely in point is *Pezant* v. *National Insurance Company,* 15 Wendell (N. Y.) 453, a decision which the

Circuit Court of Appeals in the present case refused to follow, although it is cited by *Phillips on Insurance* as stating the law and as being sound in principle. There a vesel was insured under a time policy on a valuation of $6,000. While enroute from St. Thomas to Charleston, S. C., she capsized in a hurricane. Her crew succeeded in bringing her to Charleston where the wardens concurred in an estimate that the repairs would amount to 5/6ths of her insured value. The owner sued his underwriter for a constructive total loss, but recovered only a partial loss. On appeal the Court recognized that a damage in excess of 50% would constitute a constructive total loss where the damage and the tender of abandonment occurred while the vessel was on a voyage or at a distant port; but held that there could be no tender of abandonment and no constructive total loss where the vessel had reached her "port of destination", unless the damage was such that the cost of recovery and repair would exceed her *entire* value when repaired. Judge Bronson, speaking for the Appellate Court said (p. 461):

> "The law was, I think, correctly expounded by the judge on the trial. He charged the jury, in substance, that the plaintiffs could not recover as for a total loss, unless the vessel was so damaged that the expense of her repairs would be equal to, or exceed her value, when repaired. There is no complaint that the partial loss, for which the plaintiffs have recovered, was not properly adjusted."

To the same effect is *Merchants Mutual Insurance Co.* v. *New Orleans Mutual Insurance Co.*, 24 La. Ann. 305, 307.

The only cases which have been cited as contrary to the doctrine laid down by the above authorities are two old Pennsylvania decisions referred to in the *Pezant* case and in the present decision. The case of *Ralston* v. *Union Insurance Co.*, 4 Binney (Pa.) 386 (1812), is merely dictum on the point, as the claim for a constructive total loss was actually rejected on the ground that the damage was less than 50%. The case of *Peters* v. *Phoenix Insurance Co.*, 3 Sergeant & Rawle (Pa.) 25 (1817), as pointed out

in the *Pezant* case, was also probably dictum. These cases, however, are clearly distinguishable on the ground that in both of them the vessel had actually been sold in a port of distress in a foreign country—Funchal, Madeira, in the *Peters* case, and Antwerp, Belgium, in the *Ralston* case. The authorities have always recognized that where a vessel has necessarily been sold in a foreign port she is an actual total loss and the question of abandonment does not arise. Thus in *American Insurance Company* v. *Ogden* (15 Wend. 532, 20 Id. 287) the Court said (p. 540):

> "* * * the right to abandon does not in all cases depend upon the amount of damages; but as was said in *Peale* v. *Ins. Co.*, the right exists in all cases where the ship is gone from the control of the insured; where the voyage is broken up; and, as in *Ins. Co.* v. *Southgate* where a sale of the ship has become necessary for the interest of all concerned."

On the same subject Phillips, the leading American text writer on the law of Marine Insurance, has this to say:

> "It has been held in divers cases, that, the ship having been sold justifiably as between the parties to the policy, on account of the perils insured against, the assured may recover for a total loss without an abandonment." Phillips on Insurance, 5th Edition, Volume 2, Section 1497.

Arnould, the leading English text writer states the rule as follows:

> "In many of the old cases, the question as to the right of the assured on ship, in respect of such casualties, to recover as for a total loss will be found to have arisen after the exercise by the master of the power which the law gave him in cases of extreme emergency to sell or otherwise dispose of the ship, for the benefit of all concerned. In such cases this question was very generally made to turn on the point whether the sale by the master was or was not justified by the urgent necessity of the case, it being considered that, wherever the circumstances were such as to justify the master in selling, there was a total

loss in respect of which the assured might recover from his underwriters."

Arnould on Marine Insurance and Average, 12th Ed., Vol. 2, Sec. 1113.

These authorities show that the courts have, very properly, attached great importance to a justifiable sale of the vessel in a port of distress.

We think the early background and origin of the 50% rule are nowhere better illustrated than in an opinion written by Mr. Alexander Hamilton for Mr. Archibald Gracie in 1800. We attach hereto as an appendix a copy of this opinion, the original of which is in the possession of petitioner's counsel. This opinion relates to the case of the Ship "Dauphin" which had been sold in a port of distress. We quote the following paragraph from the opinion:

"The expences and the salvage decreed amount to not a great deal less than half the whole value. I do not think it can be said that it was the duty of the assured to advance so large an additional sum of capital to enable the vessel to prosecute her voyage (admitting that her condition at the time presented no serious obstacle to its prosecution). If not the sale for payment of the salvage was a necessary consequence; which includes the loss of a voyage as she did not reach her destination—and as I think would form a case proper for abandonment and recovery as for a total loss. The cargo being nearly absorbed in payment of salvage expenses."

We call attention to the fact that it was the sale of the vessel and the frustration of the adventure rather than the percentage of loss which, in Mr. Hamilton's opinion, justified the claim for a total loss. At that time the courts had not adopted any rule of thumb such as the 50% rule; and the subsequent adoption of this percentage as the minimum which would justify the abandonment of the adventure, was certainly not intended to change the entire basis of the American law as to constructive total loss. The decision in the present case ignores the entire history and background of the 50% rule, which, as

originally applied, did not involve any fundamental departure from the English law with respect to constructive total loss.

If the *Pezant* case were an isolated early decision which had never been adopted or followed by any text writer of authority, the federal courts might have more justification for brushing it aside. Phillips, however, is easily the leading American authority on marine insurance and his work on the subject has been followed for generations by persons engaged in the marine insurance business. We attach hereto as an appendix a list of cases in which his work has been cited by this and other American courts and by the English courts, including the House of Lords.

Mr. Phillips, in Section 1555 of his Treatise on Insurance, after citing the *Pezant* case and discussing its basis both from the historical standpoint and that of legal principle, specifically disagrees with the decision in *Peters* v. *Phoenix Insurance Co., supra,* and states:

> "The better doctrine seems to be that *damage exceeding fifty per cent merely, independently of other considerations, does not constitute a constructive total loss, authorizing the making of an abandonment of the vessel after arrival at its home port of destination.*" (Italics are the authors.)

The Circuit Court of Appeals, in its decision, entirely failed to note the reasons underlying the distinction drawn by the authorities which have formulated the "American Rule", between the case of a vessel or cargo damaged and abandoned to underwriters while on a voyage or in a distant port, and the case of a ship or cargo which is damaged, and sought to be abandoned in her home port or its equivalent.

The lower courts took the view that there could be no constructive total loss in the case of the "Dauntless" unless the 50% rule applied. They overlooked completely the fact that where the cost of repairs exceeds the actual or agreed value the assured always has the right to abandon and claim a constructive total loss, even in the

port of destination. *Pezant* v. *National Insurance Co.*, 15 Wend. 453, 461; *Phillips on Insurance*, 5th Edit., §1532.

The 50% rule (unlike the English rule) violates, in many instances, the fundamental concept that insurance is a contract of indemnity, for it often permits recovery of an amount more than sufficient to make good the damage. However, when the 50% rule was adopted, over a hundred years ago, communication was slow and the possibility of sending help to a vessel in distress at a distant point was uncertain. There was accordingly some justification for a rule which transferred to the underwriters the difficulties and uncertainties flowing from a *substantial* damage to the insured *res where that res was far afield.* No such consideration was involved where the insured *res* was "at home" or "arrived home" before abandonment was tendered. Accordingly, where cargo reached its destination damaged, or where the damaged ship arrived at or was in its home port, or "in the possession of the owner", rather than on a voyage or in some distant port, the rule of *indemnity* was applied and the assured was permitted to recover only his *actual loss. If that loss were 100% of the repaired value, the owner's loss was in fact total and he could abandon,* as pointed out in the *Pezant* case and by Phillips. That has been the settled law since 1836 in New York, since 1854 in Massachusetts, and since 1872 in Louisiana. And it has been the law in the Federal Courts since the decision of Mr. Justice Washington in *Seton* v. *Delaware Insurance Company*, 21 Fed. Cas. No. 12675, in 1808. It is supported by all the textwriters who have considered the matter. Prior to the decision herein, no case will be found in which an owner, in a case like the present, has been permitted to recover more than his *actual loss.*

The injustice of the rule adopted below is especially aggravated in cases like the present, involving large ocean-going yachts. These vessels are ordinarily built or remodelled to suit the tastes of an individual owner. They have no ready market value at best, and in times of financial depression they have almost no commercial value. To allow such craft to be abandoned to underwriters

because of a damage slightly exceeding 50% is, indeed, a far cry from the original basis for the 50% rule, which was worked out in this country for the assistance of the early builders and operators of sailing vessels forced to seek ports of refuge in foreign countries.

That the right to abandon for a constructive total loss should be restricted rather than enlarged has been recognized in England from the earliest times. *Bainbridge* v. *Neilson*, 10 East 329, 343 (Lord Ellenborough, 1808); *Goss* v. *Withers*, 2 Burr. 683, 697 (Lord Mansfield, 1758); *Mitchell* v. *Edie*, 1 T. R. 608, 611 (1787).

And the same thing has been uniformly recognized in this country. Thus in *Seton & Delaware Insurance Company*, *supra*, Mr. Justice Washington, later a member of this Court, said (p. 1095):

> "The doctrine of abandonment has gone far enough, perhaps too far, when the nature of the contract of insurance is considered."

Similar statements are found in *Deblois* v. *Ocean Insurance Co.*, 16 Pick (Mass.) 303, 314; *Ruckman* v. *Merchants Louisville Ins. Co.*, 5 Duer (N. Y.) 342, 362; *American Insurance Co.* v. *Ogden*, 20 Wend. (N. Y.) 287, 306-7, 320; and in Couch on Insurance §1724.

In its opinion in the present case, the Circuit Court of Appeals holds flatly that "the American rule is the moiety rule", and that under the American Rule a vessel owner (in the absence of a policy provision to the contrary) can *always* abandon when the damage exceeds 50%. It calls the *Pezant* case "a strange phenomenon, not fitting into the general pattern of marine insurance law", and refers to the "peculiar result which would follow" if the rule of the *Pezant* case were applied here. This seems an extraordinary statement in view of the fact that the result of applying the *Pezant* case would only be that the assured would recover his actual damages instead of more than twice this amount. While the attitude of courts and juries towards insurance companies has not been par-

ticularly friendly, we think the point has not yet been reached in this country where it is generally considered "peculiar" for an assured to recover less than the face amount of his policy in the case of a partial loss.

The Circuit Court of Appeals wholly ignores the following facts:

(a) That in one of the earliest (and still one of the most authoritative) decisions on the matter, this Court, in *Marcardier* v. *Chesapeake Insurance Co., supra*, specifically limited the 50% rule to cases where the damage occurred "*short of the port of destination*"; and that Mr. Justice Washington, in *Seton* v. *Delaware Insurance Co., supra*, similarly limited it;

(b) That in the case of *cargo*, the 50% rule is *always* limited to cases where the damage occurs and abandonment is tendered prior to arrival at destination (see cases cited *supra* from Massachusetts, Louisiana and New York).

(c) That no court has ever before suggested that there was any distinction between hull and cargo, so far as concerns constructive total loss; and that accordingly the *Pezant* case is in no sense "peculiar"—it merely applies to hull the rule established by this Court in 1814 in the *Marcardier* case, and consistently followed in cargo cases from that day to this.

The decision in this case, by extending the 50% rule to a situation where it has never before been applied, makes the rule a basis for unjust enrichment, whereby an assured, under a contract which is supposed to indemnify him against loss, can recover twice the loss he has actually sustained.

POINT III.

The courts below, under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383, were bound by and should have followed the State Court decision in *Pezant* v. *National Insurance Company*, 15 Wendell (N. Y.) 543, which holds that there can be no recovery for a constructive total loss unless the cost of recovery and repair exceeds the entire insured value, where the vessel is at her home port or its equivalent.

It does not appear from the record where the policies here involved were delivered and took effect. As, however, they were signed in Massachusetts (R. 102, 120) and the present suit is brought in New York, we take it that these are the only laws that could apply. As the Circuit Court of Appeals devoted most of its discussion to the New York law, which it declined to follow, it evidently assumed, we think correctly, that this is the law which would apply if it were bound to follow state law. In this brief we shall discuss the case on that basis.

The respondent, having elected to sue in the Federal Court in New York, that court, certainly in the absence of any allegation or proof that the contracts were governed by the law of some state other than New York, should have ascertained what the New York law was and having so ascertained, was bound, under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, to follow it. The courts below ascertained that the New York law was as set forth in *Pezant* v. *National Insurance Company*, 15 Wendell (N. Y.) 453, and having so found, proceeded to disapprove of that case and refuse to follow it. In the latter regard the courts below committed fundamental error.

1. Prior to the decision in *Erie Railroad* v. *Tompkins*, *supra*, the federal courts, in dealing with policies of

marine insurance, applied "federal law", regardless of whether the suit were at law or in admiralty. The reason was that in matters of general commercial law the federal courts, under the rule of *Swift* v. *Tyson*, decided what the law should be, regardless of state court decisions. In *Washburn and Moen Mfg. Co.* v. *Reliance Marine Insurance Co.*, 179 U. S. 1, this Court had before it a marine insurance policy covering cargo in process of importation, and in refusing to follow state law, said (p. 14):

> "It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of the Commonwealth. *Kettell* v. *Alliance Ins. Co.*, 10 Gray 144; *Mayo* v. *India Mut. Ins. Co.*, 152 Mass. 172. Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of *general commercial law*, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law." (Our italics.)

It was precisely this doctrine which was overruled in *Erie Railroad Company* v. *Tompkins*, where this Court said (p. 78):

> "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', *be they commercial law* or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." (Our italics.)

2. The fact that the present suit is in admiralty rather than at law does not render the rule of *Erie Railroad* v. *Tompkins* inapplicable. This Court there held that the substantive rights of litigants should not depend on the accidental circumstance that a particular case was removable (and was removed) from the state court to the federal court. Similarly the substantive rights of litigants cannot depend on the circumstance (accidental from the

standpoint of the petitioner) of whether the suit is brought on the law or the admiralty side of the court.

There is, of course, a field within which the general admiralty law is not merely supreme, but from which all state law, whether legislative or judicial, is excluded.

> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205;
> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160.
> *Cf. Parker* v. *Motor Boat Sales*, 314 U. S. 244.

Certain classes of maritime contracts, such as contracts for the hire of seamen, fall exclusively within the realm of the general admiralty law and are not subject to state law; and this is true whether the suit in which the contract is involved is at law or in admiralty, or in a state or federal court.

> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205;
> *Union Fish Co.* v. *Erickson*, 248 U. S. 308.

Policies of marine insurance are not contracts of that kind. When a suit is brought in a state court on a policy of marine insurance, the state court is and always has been free to apply its own law thereto, regardless of what the law may be in the federal court and regardless of "the general admiralty law". For example:

(a) The rule in the federal courts has been that there can be no constructive total loss under a policy warranted "free of particular average"—only actual total loss is recoverable. *Washburn and Moen Mfg. Co.* v. *Reliance Marine Ins. Co.* (*supra*). A precisely contra rule prevails in New York. *Devitt* v. *Providence Washington Ins. Co.*, 173 N. Y. 17.

(b) The rule in the federal courts has been that in computing a constructive total loss under a marine hull policy, there can be no deduction of "one third old for new". *Bradlie* v. *Maryland Ins. Co.*, 12 Pet. 378; *Soelberg* v. *Western Assurance Co.*, 119 Fed. 23. A precisely contra

rule prevails in New York, Maine and Massachusetts. *Fiedler* v. *N. Y. Ins. Co.*, 13 N. Y. Sup. Ct. Rep. (6 Duer) 282; *Pezant* v. *National Ins. Co.*, 15 Wend. 453; *Dunning* v. *Merchants Mut. Ins. Co.*, 57 Me. 108; *Haebner* v. *Eagle Ins. Co.*, 10 Gray (Mass.) 131; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick (Mass.) 191.

(c) The "high probability" rule as a test of constructive total loss under a marine policy has been adopted in the federal courts (*Orient Ins. Co.* v. *Adams*, 123 U. S. 67), whereas the "high probability" rule has been rejected in Massachusetts and Ohio. *Marmaud* v. *Melledge*, 123 Mass. 173; *Sewall* v. *U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Peabody Ins. Co.* v. *Memphis, etc. Packet Co.*, 5 Ohio Dec. 417.

If a marine insurance policy, like a contract for hire of a seaman, fell within the field covered by the doctrine of essential uniformity in admiralty, there could never have been this divergence between the state and federal courts. No court has ever suggested that a marine insurance contract is within the doctrine of *Southern Pacific Co.* v. *Jensen*.

3. The case of *Just et al.* v. *Chambers, Executrix*, 312 U. S. 383, is controlling here. There injuries were received by guests on a yacht in Florida waters. The owner of the yacht died and his executrix petitioned for limitation of liability in admiralty. Limitation was denied and the lower court imposed full *in personam* liability on the estate, under a Florida statute which provided for survival of tort liability. The Circuit Court of Appeals reversed on the ground that in admiralty, personal liability for torts did not survive. This Court reversed the Circuit Court of Appeals and held that the state statute was controlling. The Court held (pp. 389, 392) that state law is binding in admiralty, provided the state law—

> "'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony

> and uniformity in its international and interstate relations.' * * * Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved."

The "Friendship II" involved a state statute, whereas the case at bar involves state law established by judicial decision. That is an immaterial difference.

4. Even if marine insurance contracts fell within the rule of *Southern Pacific Co.* v. *Jensen*, and were within a field in which the general admiralty law is exclusive and supreme, the present case would fall within the exception laid down by this Court in such cases as *Great Lakes Company* v. *Kierejewski*, 261 U. S. 479; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; and *Millers' Underwriters* v. *Braud*, 270 U. S. 59. Those cases hold that in matters of purely local concern, state law controls, even in a field in which, if the matter were one of general concern, the general admiralty law would be supreme.

The present case is obviously one of purely local concern. The "Dauntless" was not engaged in commerce or navigation. She was laid up and out of commission, and so warranted for the policy duration. Under such circumstances, to hold that the policy should be construed according to state law, obviously could work no

> "prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations."

Conclusion.

Because the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court and of the Circuit Court of Appeals in the Fifth and Seventh Circuits; because the decision repudiates the rule heretofore uniformly followed in determining the existence or

non-existence of admiralty jurisdiction in matters of contract; because it greatly extends the scope of the exceptional doctrine of constructive total loss, which the courts have repeatedly said should not be extended; and because, in total disregard of the doctrine enunciated in *Erie Railroad* v. *Tompkins* and *Just* v. *Chambers*, it disapproves and refuses to apply applicable and controlling state law in the field of marine insurance, we respectfully submit that a writ of certiorari should be granted in order that the questions herein may be definitely and finally decided.

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

Appendix I.

Partial List of Decisions and Text-Books in Which Phillips on Insurance Has Been Cited.

In this Court: *Insurance Company* v. *Transportation Company*, 79 U. S. 194, 196-7; *Hooper* v. *Robinson*, 98 U. S. 528, 536-7; *London Assurance* v. *Companhia De Moagens Do Barreiro*, 167 U. S. 149, 174-5; "We shall content ourselves in this respect by quoting the conclusion expressed in 2 Phillips on Insurance," *Canada Sugar Refining Co.* v. *Insurance Co. of North America*, 175 U. S. 609, 618, 619, 624-5; *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423, 430.

In the House of Lords: "In Phillips on Insurance * * * that very experienced author," *Aitchison* v. *Lohre*, 4 App. Cas. 755, 763-4; *P. Samuel & Co. Limited* v. *Dumas* (1924), A. C. 431, 445; "That admirable writer on insurance law, Phillips," (*Norwich Union Fire Insurance Society* v. *Wm. H. Price, Ltd.* (1934), A. C. 455, 466.

In the Court of Common Pleas: *Dickenson* v. *Jardine*, L. R. Common Pleas Cases, Vol. III, pages 639, 642; "Mr. Willard Phillips' highly valuable work on Insurance," *Denoon* v. *The Home and Colonial Assurance Company*, L. R. Common Pleas Cases, Vol. VII, pages 341, 347-8; "a book of the highest authority as to English as well as American insurance law," *Harris* v. *Scaramanga*, L. R. Common Pleas Cases, Vol. VII, pages 481, 496; *Daniels* v. *Harris*, L. R. Common Pleas Cases, Vol. X, pages 1, 6, 7.

Richards on the Law of Insurance, §417 (4th Edit. 1932), says:

> "* * * it is worthy of mention that the English judges, as well as the American, often cite with approval a text book on this subject [Phillips on Insurance] written many years ago by a New England gentleman, which ranks in merit with the standard work of old England by Mr. Arnould."

Arnould on Marine Insurance and Average, the leading English text-book on marine insurance, cites *Phillips* constantly as authority on American law. It is interesting to note that in a footnote to Section 1117, which is cited by the Circuit Court of Appeals in the present case, Arnould states that

> "the 50% rule applies also in the United States in the case of damaged goods: see *Phillips*, s. 1608; *Washburn Manufacturing Co.* v. *Reliance Marine Insurance Co.* [1900], 179 U. S. 1."

Accordingly, we have the rather curious situation that the Circuit Court of Appeals cites, as an authority on American law, an English text-book which, in turn, cites as its authority the work of *Phillips*, whose authority the Circuit Court of Appeals had declined to recognize.

Appendix II.

For

Mr. A. Gracie
Case & Opinion.

I have carefully considered the case of the Ship *Dauphin*. It is a case not without difficulty from some *particular* circumstances. But the result of my best reflections is this—(viz.)

The expences and the salvage decreed amount to not a great deal less than half the whole value. I do not think it can be said that it was the duty of the assured to advance so large an additional sum of capital to enable the vessel to prosecute her voyage (admitting that her condition at the time presented no serious obstacle to its prosecution). If not the sale for payment of the salvage was a necessary consequence; which includes the loss of the voyage as she did not reach her destination—and as I think would form a case proper for abandonment and recovery as for a total loss. The cargo being nearly absorbed in payment of salvage expenses.

If then the assured, when advise was received of the capture, recapture and amount of the salvage, abandoned or did what was equivalent to it, he ought to be satisfied as for a total loss.

If he did not then abandon or do what was equivalent he ought to be considered as having elected to take the chance of the market at the place of sale—& this would change the total into a partial loss—consisting of the amount of the salvage and expenses of law proceedings, repairs if any & other extra expenses.

A. HAMILTON,
Sep. 1, 1800.

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 335

AETNA INSURANCE COMPANY,

Petitioner,

against

ROBERT C. JEFFCOTT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE C. SPRAGUE,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

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Statement

This cause presents no reason within Rule 38, paragraph 5, for the issuance of a writ of certiorari. Neither the decision of the Circuit Court of Appeals (R. 1932-41, reported in 1942 A. M. C. 1021, but not yet officially reported) nor any one of the three separate decisions in the District Court, which the Circuit Court of Appeals affirmed (that of Judge Coxe overruling petitioner's exceptions to the first and third causes of action in the libel—R. 44-50, officially reported in 32 F. Supp. 409; that of Judge Bondy denying petitioner's motion to dismiss the libel for lack of admiralty jurisdiction—R. 80-1, not officially reported; that of Judge Clancy finding as a fact, after trial on the merits at which all of the thirty-eight witnesses testified in open court, that the vessel was a constructive total loss

within the terms of the policies and awarding decree to respondent for the full amount of both policies plus sue and labor charges as provided therein—R. 1885-1906, officially reported in 40 F. Supp. 404) is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit Court of Appeals or with applicable local decisions.

The questions involved on this petition are not of general importance nor do they affect the public interest; they merely relate to private contractual rights under petitioner's marine insurance policies issued to respondent in consideration of premiums duly paid. The basic points of law upon which the Courts below found petitioner liable to respondent on these policies are, in fact, well established by the decisions of this Court (*New England Marine Ins. Co.* v. *Dunham,* 11 Wall. 1; *Marcardier* v. *Chesapeake Ins. Co.,* 8 Cranch. 39; *Patapsco Ins. Co.* v. *Southgate et al.,* 30 U. S. 604; *Bradlie and Gibbons* v. *Maryland Ins. Co.,* 37 U. S. 378; *Orient Mutual Ins. Co.* v. *Adams,* 123 U. S. 67).

The Cause Below

On June 7, 1938, petitioner, a Connecticut corporation, for stated premiums duly paid, issued two marine insurance policies to respondent, a New Jersey resident (R. 311), insuring him against loss or damage to his yacht "Dauntless" for one year commencing June 24, 1938. The home port of the "Dauntless" was Boothbay Harbor, Maine (R. 1722). The policies were countersigned by petitioner at Boston, Mass. (R. 29, 40). Policy No. Y8565 was on hull and machinery (R. 22-9) and policy No. Y8566 on disbursements (R. 36-40).

The hull policy Y8565 insured respondent against loss or damage by marine perils to the "hull, spars, sails and tackle and apparel, materials, fittings, boats * * * furniture * * * stores, supplies * * * refrigerating and electric light plans and installation and all machinery, boilers, engines, etc." of the "Dauntless" at an agreed value of $240,000.

In addition to provisions (R. 22-4) which the Circuit Court of Appeals referred to as couched in "the traditional language of the admiralty" (R. 1934), the hull policy contained clauses reading as follows:

> "* * * *The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss"* (R. 25).
>
> "Warranted by the assured that the within named vessel shall be laid up and out of commission at the Thames Ship Yard, New London, Connecticut during the currency of this policy" (R. 26).

The disbursement policy Y8566 insured respondent against loss or damage by marine perils "on disbursements and/or shipowners' liability as below, of Aux. Diesel Schooner *'Dauntless'* for $80,000". This policy contained the same "traditional language of the admiralty" as the hull policy and also the following, among other clauses:

> "* * * *A total and/or constructive total loss paid by Underwriters on hull to be a total loss under this Policy"* (R. 37).
>
> "Warranted laid up and out of commission at the Thames Ship Yard, New London, Conn. during the currency of this Policy" (R. 40).

Because of their importance, photostatic copies of the original policies are annexed hereto, the hull policy being marked Appendix "A" and the disbursement policy Appendix "B".[1]

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[1] These policies (Appendices "A" and "B") are on the usual marine insurance policy forms and include clauses never found in any other type of insurance. The clause enumerating the perils insured against is practically identical with that in Lloyd's policy as printed in Arnould on Marine Insurance, Vol. I, Sec. 10, p. 17 (12th Ed.). Any variance from Lloyd's form is due to the fact that in the hull policy (Appendix "A") respondent warranted the vessel "free from capture, seizure, arrests", etc. Having been prepared by petitioner on its own printed forms, the policies should be strictly construed against it (*Phoenix Ins. Co.* v. *Slaughter*, 79 U. S. 404; *Noonan* v. *Bradley*, 76 U. S. 394).

The "Dauntless" was thereafter towed from Perth Amboy, N. J., to New London, Conn., and moored alongside a pier of the Thames Ship Yard "out of commission" and withdrawn from active use because of respondent's ill health. The respondent intended to use her as a yacht the following year (R. 314). She remained waterborne and did not lose her identity as a vessel while out of commission. Her diesel engine was opened up for the inspection of Lloyd's surveyor (R. 230); repairs were made to her rudder (R. 182, 523, 1463); her Steamboat Inspectors' licenses were kept in force (R. 509-10); and her classification was continued by Lloyd's Register (R. 617). She could have been put into service in a short time had respondent's health permitted him to use her (R. 1467).

On September 21, 1938, while the "Dauntless" was thus properly moored at the Ship Yard's pier and during the term of the said policies (R. 102), she was struck by a hurricane which broke most of her lines, caused other lines to pull out a portion of the pier and cast her adrift so that she was driven ashore by the wind and waves, where she finally fetched up with her bow impaled on hulks of wrecked barges, with her stern projecting at an angle into mud and shallow water. Water entered her hull, submerging her engines, generators, machinery and auxiliary appliances, and flooding her dining salon, library, cabins and other portions of her interior. A pier shed, in which the yacht's lines, gear, linen, bedding and other furnishings and equipment (covered by the hull policy, Appendix "A") were stored, was torn from its foundations by the hurricane and swung around into the bay where its contents were recurrently submerged by the tides and so damaged as to become a total loss (R. 1907-8). The damage was admittedly caused by perils insured against by the policies (R. 54).

Respondent promptly notified petitioner of the disaster, personally examined the "Dauntless" and also had her examined by competent marine advisors, including her designer and supervisor of construction, and as a result

thereof became convinced that she was a constructive total loss and abandoned her to petitioner on September 29, 1938, but petitioner declined to accept such abandonment (R. 323, 1586-7, 1933). Petitioner eventually salvaged the yacht and returned her to the Ship Yard's pier, after which surveys were held and specifications for repairs were agreed to and submitted to repair yards for bids. Independent surveys were also had of the damaged rigging, furniture and batteries, not included in the specifications. Respondent then filed his claim with petitioner for the full amount of both policies, plus certain sue and labor expenses, and, when his claim was declined, filed his libel therefor, resulting in decisions of the District Court (32 F. Supp. 409; R. 80-1, not officially reported; 40 F. Supp. 404) in his favor, affirmed by the Circuit Court of Appeals (1942 A. M. C. 1021, not yet officially reported), referred to more fully in our initial statement.

ARGUMENT

POINT I

The courts below correctly ruled that the cause was within admiralty jurisdiction.

Petitioner makes the unfair statement that the Circuit Court of Appeals disposed of this question of jurisdiction "rather casually by treating it as a mere matter of nomenclature" (brief, 12). Nothing could be further from the fact. Following the three sentences of the opinion quoted by petitioner (brief, 12), the Court continued for more than three printed pages to discuss this question in a logical and well-reasoned decision during which it (1) analyzed the terms of the policies and the marine risks covered thereby (R. 1934); (2) traced the development of admiralty jurisdiction over marine insurance contracts in the United States, beginning with the learned and exhaustive opinion

of Mr. Justice Story on circuit in 1815 in *De Lovio* v. *Boit*, 7 Fed. Cas. 418, No. 3776, which this Court later said "has never been answered, and will always stand as a monument of his great erudition" (*New England Marine Ins. Co.* v. *Dunham*, 11 Wall. 1, 35), continuing with this Court's decision in 1851 in *New England Marine Ins. Co.* v. *Dunham*, *supra*, and ending with a group of cases in the United States District Courts and Circuit Courts of Appeals during the seventy-one years since 1851 which accepted "admiralty jurisdiction simply on the ground that the Supreme Court in the *Dunham* case had settled the issue" (R. 1936); (3) discussed petitioner's contention that language in *De Lovio* v. *Boit*, *supra*, and in *New England Marine Ins. Co.* v. *Dunham*, *supra*, referring to contracts of which admiralty has jurisdiction as those relating "to the navigation, business or commerce of the sea", was restrictive in character, and held that they were not terms of limitation *qua* marine insurance and that in any event the words "business or commerce of the sea" would cover insurance against sea perils, "whether the insured ship be loaded or unloaded, moving or laid up" (R. 1936); (4) pointed out that the circumstances of the "Dauntless" being laid up and out of commission as warranted merely decreased the *quantum* of risk and not the type of risk which remained maritime in nature (R. 1934-5); (5) discussed petitioner's suggested analogy of "other types of contracts where distinctions have been made between ships engaged in active service and ships laid up" and declined to apply it because "these distinctions** are generally unreal and their continued life rests on their settled nature, not on their merit. See *Thames Towboat Co.* v. *The Francis McDonald*, 254 U. S. 242, 244", concluding, "We see no value in erecting another set of unreal distinctions here, when it can be demonstrated that the contract in issue fairly fits the original rule laid down" (R. 1937).

Petitioner in the Circuit Court of Appeals made the same arguments as it makes in Point I of its petition and brief

and cited the same cases, and it is difficult to see how the Court below could have reached a different conclusion.[2] In *New England Marine Ins. Co.* v. *Dunham,* 11 Wall. 1, this Court established admiralty jurisdiction of marine insurance policies as maritime contracts in the broadest terms as had Mr. Justice Story in *De Lovio* v. *Boit,* 7 Fed. Cas. 418, No. 3776. Language used in these cases and not quoted by petitioner either before the Courts below or in its petition herein indicates that the reason for holding a marine insurance policy to be a maritime contract was because it insured a vessel or cargo against marine risks. In *De Lovio* v. *Boit, supra,* Mr. Justice Story said.

> *"There is no more reason why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than policies of insurance. Both are executed on land and both intrinsically respect maritime risks, injuries and losses"* (p. 444).

And this Court said in *New England Marine Ins. Co.* v. *Dunham, supra,* in drawing an analogy between contracts of affreightment on the one hand and marine insurance contracts on the other:

> *"The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties"* (p. 30).

Marine risk is the subject matter of a contract of marine insurance and petitioner's contention to the contrary (brief, 18) is unsound.

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[2] In the District Court, Bondy, D. J., denied the motion to dismiss the libel in an unreported memorandum opinion reading as follows:

> "The object insured was a vessel which had never lost its identity as a vessel. Moreover the risks against which it was insured, were perils of the sea, maritime in nature. The loss was the result of a maritime disaster caused by an hurricane. The Court therefore is of the opinion that the Admiralty Court has jurisdiction notwithstanding that the policies provided that the yacht *Dauntless* should be laid up and out of commission for one year, the term of the policies. See Insurance Co. v. Dunham, 11 Wall. 1" (R. 80-1).

Petitioner's statement (brief, 17) that marine insurance is written on bridges, piers, wharves, etc., but that no one could conceivably argue that such a policy was a maritime contract is immaterial, if true. The "Dauntless" was a maritime *res,* waterborne and still a maritime subject though laid up and out of commission. Moreover, no bridge or wharf could be subject to all the perils covered by the policies herein (Appendices "A" and "B", *infra*). *Cope* v. *Vallette,* 119 U. S. 625 (brief 6, 17), has no significance. The drydock was not subject to salvage charges because it was not maritime property such as a ship or its cargo. As salvage is *sui generis* and known only to admiralty, the question was one of lack of jurisdiction only because there was no cause of action in any court.

Until petitioner's motion below before Bondy, D. J., the *Dunham* decision was given the broadest interpretation by bench and bar and its doctrine was held to be unrestricted and unfettered.[3] To change the rule now would lead to confusion and increase litigation.

North Pacific Steamship Co. v. *Hall Bros.,* 249 U. S. 119, 125, is cited by petitioner (brief, 13) as authority for the

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[3] In *The Iris,* 100 F. 104, 113, the United States Circuit Court of Appeals for the First Circuit said:

> "The decision in Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90, which held that a marine insurance policy is a maritime contract, and within the jurisdiction of the admiralty courts of the United States, *threw off all fetters, and left all questions of this class to be determined on general and harmonious principles.*"

See also cases cited in the Circuit Court of Appeals opinion herein (R. 1936), especially *St. Paul F. & M. Ins. Co.* v. *Pacific Cold Storage Co.,* 157 F. 625, 629, 631 (C. C. A. 9). In this case the Court, citing *Insurance Co.* v. *Dunham,* 11 Wall. 1, overruled a marine underwriter respondent's exception to admiralty jurisdiction of a cause by its insured (owner of cargo shipped on a river vessel) for sue and labor expenses incurred in carrying the cargo forward by land in order to save it from marine perils insured against after the vessel stranded. The underwriter's exception was based on the fact that these expenses were incurred "on land" to save the cargo alone.

statement that the sole test of admiralty jurisdiction is whether the contract relates to the "navigation, business or commerce of the sea". However, in that case this Court, citing *New England Marine Ins. Co.* v. *Dunham, supra,* as authority, held that admiralty had jurisdiction of a suit on a contract for repairs to a wrecked and laid up vessel irrespective of whether the repairs were made "while she is afloat, while in drydock, or while hauled up by ways upon land. *The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all*".[4] The same reasoning applies to contracts of marine insurance, and admiralty has jurisdiction thereof, whether the vessel be in actual navigation or be "laid up and out of commission" at the time of the accident, since the marine nature of the risks insured is identical.

The tendency of this Court since *New England Marine Ins. Co.* v. *Dunham, supra,* has been to extend, rather than to restrict, admiralty jurisdiction. In *New Bedford Drydock Co.* v. *Purdy,* 258 U. S. 96, 99, in determining whether a contract was for ship construction, of which admiralty has no jurisdiction, or for ship repairs, of which it has jurisdiction, this Court declined "to enlarge the compass of the rule approved in *Thames Towboat Co.* v. *The Francis McDonald*" (254 U. S. 242), stating that "*reasonable doubts concerning the matter should be resolved in favor of the admiralty jurisdiction*". Likewise, in *Krauss Bros. Lumber Co.* v. *Dimon Steamship Corp.,* 290 U. S. 117, 124, this Court reversed the decrees below and held that admiralty

[4] See also *The Harvard,* 270 F. 668 (D. C., E. D. N. Y.) and *The V-14813,* 65 F. (2d) 789 (C. C. A. 5), holding that admiralty has jurisdiction of a contract for repairs to a vessel even while "laid up", and that there is a lien therefor where the services are for the vessel's benefit. *The V-14813* was not overruled by *Kibadeaux* v. *Standard Dredging Co.,* 81 F. (2d) 670, as contended by petitioner (brief, 13). The *Kibadeaux* case was for personal injuries where the place of the injury and not the subject matter controls, and whatever was said by the Court with reference to *J. C. Penney-Gwinn Corporation* v. *McArdle,* 27 F. (2d) 324, is *dictum.* Also see *Kilb* v. *Menke,* 121 F. (2d) 1013 (C. C. A. 5), where the same Court sustained admiralty jurisdiction of a libel for possession of vessels that had been tied up and out of commission for almost four years.

had jurisdiction of a cause both *in rem* and *in personam* for repayment of excess freight made by a shipper under mistake of fact, and dismissed respondent's contention that the action was essentially a common law suit for money paid out and received, of which admiralty had no jurisdiction, with these words, "*Admiralty is not concerned with the form of the action, but with its substance*".

The cases cited by the petitioner in support of their alleged analogy with the cause herein (brief, 13-16) are distinguishable because the question before the courts was whether or not the *service* performed was maritime, not whether a risk was maritime. Winter storage of grain on a ship anchored and laid up for the winter season is no more a maritime service than storage in a warehouse, for which it is a substitute. Wharfage, watchmen, use of a vessel for a floating hospital or quarantine station, supplies furnished to a "laid up" ship, etc., are not maritime services since they do not benefit the business of transportation and navigation and are, therefore, not necessaries for that business.[5]

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[5] It seems hardly necessary to discuss petitioner's argument (brief, 15, 16) that, because a contract for building a ship is non-maritime (*Thames Towboat Co.* v. *Schooner Francis McDonald,* 254 U. S. 242), therefore a contract to insure an existing ship that is "laid up" should be held non-maritime. The reason that shipbuilding contracts have been held non-maritime is because the vessel does not become a ship in the legal sense until it is completed (*Tucker* v. *Alexandroff,* 183 U. S. 424, 438; *North Pacific S. S. Co.* v. *Hall Bros., etc.,* 249 U. S. 119, 127). The vessel once built, however, remains a vessel "subject to admiralty jurisdiction" until she is abandoned as no longer practically capable of use as a vessel. The *Dauntless* was not a hulk or dismantled or abandoned as incapable of use as a vessel before the hurricane struck her. A charter of a laid-up vessel is maritime if it is afloat and capable of navigation (*Kenny* v. *City of New York* (C. C. A. 2), 108 F. (2d) 958). In *New Bedford Dry Dock Co.* v. *Purdy,* 258 U. S. 96, 99, this Court declined "to enlarge the compass of the rule approved in *Thames Towboat Co.* v. *The Francis McDonald", supra.* It is respectfully suggested that this was because, like the Circuit Court of Appeals in the cause below, this Court could "see no value in erecting another set of unreal distinctions here" (R. 1937).

As yachts in our northern waters, which are ordinarily navigated during the spring and summer months only and laid up during the winter, are insured under time policies, ordinarily a year in length, which provide for a lay-up period at reduced rates, petitioner's contention, if followed, would lead to the absurd result that admiralty would have jurisdiction of a suit for marine losses during the summer months but not for similar losses during the winter months. Such an absurdity should not be presumed (*Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 459). As the Circuit Court of Appeals observed, the practice of providing for lay-up periods of yachts is "hardly an attempt to divide the year into maritime periods and non-maritime periods" (R. 1934).

The correct rule is that petitioner's contract is to be determined by its subject matter—insurance against marine risks and casualties—which makes it subject to admiralty jurisdiction. The marine risk remains of the same nature irrespective of whether the vessel is "laid up and out of commission" or in service; the only difference is one of degree. In both cases, admiralty has jurisdiction because the nature of the risk is identical. This is the general rule laid down by *Insurance Co.* v. *Dunham,* 11 Wall. 1, in marine insurance; by *North Pacific Co.* v. *Hall Bros.,* 249 U. S. 119, in ship repair contracts; by *Kenny* v. *City of New York,* 108 F. (2d) 958 (C. C. A. 2), in charter party cases; by *Treworgy et al.* v. *Richards et al.,* 10 F. (2d) 152 (C. C. A. 1), in salvage cases; by *C. H. Northam,* 181 F. 983 (D. Mass.), in limitation of liability cases; and by *Kilb* v. *Menke,* 121 F. (2d) 1013 (C. C. A. 5), in petitory and possessory cases. The Courts below were right in following that rule. They did not misconstrue the decision of this Court in *Insurance Co.* v. *Dunham, supra,* nor do their decisions "sweep aside all tests" heretofore applied by this Court and the lower Federal Courts throughout the country as petitioner alleges (brief, 18). On the contrary, their decisions are amply supported by reason and au-

thority. They are not in conflict with the Circuit Court of Appeals for the Seventh Circuit in *North German Fire Insurance Co.* v. *Adams,* 142 F. 439, as alleged by petitioner (brief 6, 17), nor are they in conflict with any other circuit. The Court in the *North German Fire Insurance Co.* case, *supra,* sustained admiralty jurisdiction of an action on a policy for fire only on a ship as a maritime contract within *Insurance Co.* v. *Dunham, supra,* although it did not cover full marine perils, saying:

> "The subject-matter is alike insurance upon waterborne property against one of the risks incident to its service in navigation" (p. 441).

As we have seen, the "Dauntless" was waterborne and the policies covered the risks incident to her being waterborne.

POINT II

The Courts below correctly applied the well-established American 50% rule in determining that there had been a constructive total loss of the yacht. This in effect was provided for by the policies and in no way worked unjust enrichment.

All discussion of the English rule of constructive total loss, allowing an insured to abandon the *res* to his underwriter only where the cost of recovery and repair exceeds the repaired (or agreed) value, is irrelevant because the policies were American contracts and the American rule applied. There can be no question that the American rule of constructive total loss allows abandonment where the cost of recovery and repair exceeds 50% of the repaired (or agreed) value (*Marcardier* v. *Chesapeake Ins. Co.,* 8 Cranch. 39, 47, 12 U. S. 39; *Patapsco Ins. Co.* v. *Southgate et al.,* 30 U. S. 604; *Bradley and Gibbons* v. *Maryland Ins. Co.,* 37 U. S. 378; *Orient Mutual Ins. Co.* v. *Adams,* 123 U. S. 67; *Royal Exch. Assur.* v. *Graham & Morton Transp.*

Co., 166 F. 32; *Arnould on Marine Ins.*, 12th Ed., 1939, par. 1117). The Courts below applied these authorities and, finding that the cost of repair exceeded 50% of the agreed value of the yacht in the policies, awarded a decree to the respondent for a total loss under both policies (Opinion of Coxe, D. J., 32 F. Supp. 409, 411; Clancy, D. J., 40 F. Supp. 404, 410; Circuit Court of Appeals R. 1937, 1939, 1940).

Petitioner's position in criticizing this aspect of the decisions below is based upon two premises, both of which must be proved in order to sustain its conclusion. These premises are (1) that the American "50 percent rule applies only to those cases in which the damage occurs and abandonment is tendered short of destination" so that an owner cannot abandon his vessel and claim a constructive total loss after she reaches destination, even though her insurance is still in force at the time of abandonment, unless he shows that the cost of restoring her would be greater than her restored or agreed value; and (2) that the "Dauntless" being laid up and out of commission as warranted in the policies was constructively always at her destination, since she could not be moved under the warranty, and therefore could not be abandoned as a constructive total loss except upon a showing that her cost of restoration exceeded her insured value. The courts below declined to accept petitioner's conclusion, having found both premises unsupported in law or fact.

The authorities cited by petitioner at page 20 of its brief in support of its first premise are not in point since each involved a policy on cargo for a specified voyage rather than for a term and abandonment was made after the insurance had expired by reason of the voyage having ended. These authorities hold nothing more than that abandonment to an underwriter in order to be effective as a basis for claiming a constructive total loss must be made promptly upon learning of the loss, which is in accordance with the rule as summarized by Chancellor Kent (III Commentaries, p. 419 [9th Ed.]).

Ruckman v. *Merchants' Louisville Ins. Co.*, 5 Duer 342, 362, cited by petitioner (brief, 20), holds only that the moiety rule in constructive total loss situations on vessels grew out of the similar rule on cargo and is to be limited thereto.

Petitioner's statement (brief, 27) that *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch. 39, 12 U. S. 39, limited the 50% rule to cases where the damage occurred short of the port of destination is unfounded. That case, considered by the Circuit Court of Appeals below (R. 1938), affirmed a decision for the defendant on the ground that the loss had not been shown to exceed "a moiety of the value". Likewise, *Seton* v. *Delaware Ins. Co.*, 21 Fed. Cas. (12675), contains no such limitation upon the 50% rule as petitioner (brief, 26, 27) claims. Mr. Justice Washington there refused to permit recovery for a constructive total loss of specie which was removed from the ship and replaced by other articles which were carried safely to destination.

Petitioner's reliance in support of its premise is based principally upon its interpretation of *Pezant* v. *National Ins. Co.*, 15 Wend. 453, decided by an intermediate appellate New York State court in 1836, a decision which has never received the sanction of any other court. In that case a ship, insured for a term, reached her port of destination, where her owners resided, and abandonment was there tendered on the ground that damages sustained during the voyage exceeded 50%. The Court denied recovery on the ground that the net expenses, after crediting general average contributions, were less than 50%. In what appears to be a dictum, it also held that, having safely reached her home port in repairable state before abandonment was tendered, the owners could recover only a partial loss.

Upon this slender authority petitioner has developed its elaborate argument that the 50% rule applies only when the ship is navigating in distant waters or is at a foreign port.

The Circuit Court of Appeals considered the *Pezant* case carefully and correctly concluded that it "is a strange

phenomenon, not fitting into the general pattern of marine insurance law" (R. 1937-9). It observed that the exception in the *Pezant* case was taken from *Marshall on Insurance*, which, in so far as term insurance is concerned, limited the rule to cases where the term had expired (R. 1938), which was the basis on which *Peters* v. *Phoenix Ins. Co.*, 3 Serg. & R., Pa., 25, "repudiated the Pezant exception"; also that the cases cited by Marshall did not support the exception (R. 1938).

It may be further observed that the dictum in the *Pezant* case rests upon a confusion between marine insurance for a period of time and insurance for a voyage, so that the Court treated the time policy as if it were a voyage policy.[6]

[6] In olden days a marine insurance policy usually covered a ship for a voyage rather than for a term, which gave rise to the fallacy that a hull policy insured both the ship and the voyage and that, if either the ship or the voyage was saved, there could be no abandonment for a constructive total loss. See, for example, *Hamilton* v. *Mendes* (1761), 2 Burr, 1198, 1209, discussed in 2 *Arnould, Marine Inurance* (12th Ed.), Section 1104. In that case Lord Mansfield, as Arnould points out, "gave great weight to a circumstance which, it is now settled, must be altogether out of consideration in determining whether the loss on the ship is or is not constructively total—viz., whether, in consequence of the casualty, there had or had not been a loss of the voyage". Arnould states that such a consideration was pertinent in relation to wager policies which were in reality nothing but wagers on the success of the voyage, but that in policies on ships "the insurance is not on the voyage, but on the ship for the voyage". In all cases of loss under such a policy, the question is how much damage is done to the ship, and not how much damage the assured has sustained by the interruption of the voyage. Lord Mansfield's error was corrected later, however, and from 1810 on it has been settled in England that the loss of the voyage has nothing to do with the loss of the ship. See, for example, *Falkner* v. *Ritchie* (1814), 2 M. & S. 290. The same principle, Arnould states, "has received abundant judicial illustration, and may be regarded as conclusively established, in the insurance law of the United States" (Sec. 1104), citing *Bradlie and Gibbons* v. *Maryland Ins. Co.*, 37 U. S. 378, 9 L. Ed. 1123; *Hurtin* v. *Phoenix Ins. Co.* (C. C., D. Pa.), 12 Fed. Cas. No. 6,941; *Alexander* v. *Baltimore Ins. Co.*, 8 U. S. 370, 2 L. Ed. 650. Possibly Judge Bronson, in the *Pezant* case, followed Lord Mansfield's error referred to by Arnould.

Petitioner adroitly creates a rule of law out of the fortuitous circumstance that most of the cases dealing with the 50% rule of constructive total loss arose from disasters on the high seas or in distant places. From this it deduces that the 50% rule is limited to disasters in distant waters, but it cites no authority except its own interpretation of the *Pezant* case, together with a quotation (brief 24) of colorless language from *Phillips on Insurance,* Sec. 1555, stating that *"The better doctrine seems to be * * * "* that of the *Pezant* exception. *Parsons on Marine Insurance II,* p. 128, cited (brief 20) is even less enthusiastic than *Phillips* concerning the exception, saying, *"There seems to be but one limitation or exception to the rule of 50 percent although even this may not be entirely certain; it is that if the vessel actually performed the voyage insured,* and reached her terminus ad quem, there can be no abandonment of her merely because she needs repairs from perils insured against, which will cost more than half her value"[7]

Moreover, it would seem that the *Pezant* case, in so far as its dictum regarding the exception to the 50% rule is concerned, was overruled by the same Court at the same term in *American Ins. Co.* v. *Ogden,* 15 Wend. 532. This was a suit for a constructive total loss of a vessel insured under a term policy of six months. It was argued that she had reached her destination before abandonment, but the owners were given judgment in an opinion which stated:

> "The circumstance of St. Thomas being the port of destination of that particular voyage seems to have been thought of consequence * * *, whether it would be so or not, I need not inquire, as the policy in this case was *on time* and the time only half expired" (p. 540). (Emphasis by the Court.)[8]

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[7] It is to be noted that Parsons makes the exception apply merely to a voyage policy and not a term policy.

[8] While the exact dates of the decisions are not given in the reports, their position in the printed volume (*American Ins. Co.* at p. 532, and *Pezant* v. *National Ins. Co.* at p. 453 of 15 Wend.) gives rise to a reasonable presumption that the *American Ins. Co.* case was decided after the *Pezant* case.

This case was reversed on other grounds (20 Wend. 287), namely, because the Appellate Court found that "there was no evidence to show that the damage amounted to half the value of the vessel" (p. 306) and also that the vessel's sale was due to culpable negligence of the owner.

Petitioner's second premise is absolutely devoid of proof or authority. To argue that the "Dauntless" was at her destination because she was laid up and out of commission as warranted is absurd. Such an argument would deprive respondent of any right to abandon for a constructive total loss under the American 50% rule, in any event, for the mere reason of compliance with the warranty, in spite of the provision in the hull policy that "the insured value [is] to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss" (Appendix "A") and the provision in the disbursement policy that "a constructive total loss paid by underwriters on hull to be a total loss under this policy" (Appendix "B"). As the Circuit Court of Appeals said: "When constructive total loss" was used in the policies involved in this suit the parties hardly visualized the Pezant exception as part of the rule. "They undoubtedly thought of the 50% rule as governing" (R. 1939).

The policies are American contracts, executed in the United States, on a yacht of American registry, by an American insurance company, for an American yacht owner, the premiums and values being stated in American dollars. Their terms are clear and unambiguous and insure the risk of a constructive total loss under both policies under the American rule. Had appellant desired to establish a different basis for such a loss, it would have written a different contract, providing, for instance, that it would only be recognized when the damages exceeded, say, 75% or 100% of the $240,000. Not having done so, it is bound by the American 50% rule.

As the Circuit Court of Appeals said:

> "To give currency to this peculiar exception expounded in the *Pezant* case would result in many diffi-

> culties in connection with time policies. Shipowners would be without the ordinary privilege of abandonment if their ships happened to be in port when damaged. And where, as here, the ship was not to be moved, abandonment under the American rule would not exist. We believe the *Pezant* case is not consistent with the general rules of constructive total loss. The American rule is the moiety rule, and applies wherever the ship is when damaged" (R. 1939).

Moreover, the factual condition which gave rise to the exceptional doctrine of the *Pezant* case is absent here. The Court's refusal to apply the 50% rule was based upon the fact that the insured did not tender abandonment until *after* the vessel had arrived home in a repairable state and was moored in safety. No comparable situation exists in the present case. Here the respondent tendered abandonment eight days after the hurricane disaster, while the "Dauntless" lay wrecked and stranded a considerable distance from Thames Shipyard, and over six weeks *before* petitioner salvaged her (R. 1885, 1886). The ground of the *Pezant* case was that the peril had passed when abandonment was tendered. In the present case the "Dauntless" was in grave peril when respondent abandoned, as her designer, who inspected her with respondent, testified:

> "The vessel was in a dangerous position, naturally. She was partly landborne and partly waterborne" (R. 806). "That is the worst spot a boat can be in" (R. 811).

Petitioner's plea, addressed to the "injustice of the rule" (brief 25), is beside the point.[9] The question in this case

[9] It is indeed strange that petitioner should be the party to cry "injustice". The District Court found that petitioner itself attempted to defraud respondent of his rights under the policies by secretly persuading the low bidder on repairs to submit its extremely low bid by promising to indemnify it to the extent of $10,000 to take care of any excess cost (R. 1895). The trial judge refused to give any attention to this bid "except to reflect that its production leaves a taint on the defense" (R. 1896). The Circuit Court of Appeals said, "We think it was reasonable to exclude this bid under these circumstances" (R. 1940).

is the application of the rule, not the result of it. Its argument that the 50% rule "violates the fundamental concept that insurance is a contract of indemnity" (brief 25) rests upon a false hypothesis.

In the leading case of *Irving* v. *Manning*, 6 C. B. 391, 1 H. L. C. 286, the House of Lords held that a marine insurance policy is not a mere contract of indemnity in respect of constructive total loss. In that case a vessel was valued in the policy at £17,500 but was worth only £9,000 when the policy was issued and also in repaired state after being damaged by perils of the sea. Holding that the market value of £9,000 in repaired state was the correct standard for ascertaining a constructive total loss and that the insurer was liable for the full amount of £17,500, the House of Lords said:

> "It is argued that this course of proceeding infringes on the generally-received rule, that an insurance is a mere contract of indemnity; for, thus the assured may obtain more than a compensation for his loss: and it is so.
>
> "A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as, indeed, they may in any other contract to indemnify" (p. 422).

POINT III

The courts below were not bound to follow the decision in *Pezant* v. *National Insurance Co.*, 15 Wend. 453, under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383.

In reliance upon the assumption that its interpretation of the *Pezant* case states the law of New York State and is controlling here, petitioner has developed an elaborate but unsound argument that the courts below decided the

present case in conflict with *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383. Its premises and conclusion are equally fallacious.

(1) New York law was not the law of the contract.

The petitioner was a Connecticut corporation (Appendices "A" and "B"), the respondent a resident of New Jersey (R. 311), and the yacht, whose home port was Boothbay Harbor, Maine (R. 1722), was covered by the policies and suffered the loss at New London, Conn. (R. 1885), and was not in New York at any time during the policy period. The trial court found that "the policies in suit here were countersigned at Boston, Massachusetts, and their validity is conditioned upon countersignature. They were issued to one Alden, a Massachusetts broker, whose sticker appears on the back of each policy. The libellant's premiums had been sent to Mr. Alden for payment. We would be inclined to call them Massachusetts contracts" (R. 1901).

Petitioner's counsel asked the trial judge to apply the Massachusetts law and he held that law to be "not different" from that of the federal courts sitting in admiralty on constructive total loss (R. 1901). And see argument of petitioner's counsel at conclusion of the trial in which he stated that if the case "were on the common law side of the Court there would be no question that this Court would be bound to apply the Massachusetts law under the decision of the Supreme Court in the *Erie Railroad* v. *Tompkins* case" (R. 1534).

Petitioner's brief in the Circuit Court of Appeals at page 8 stated that "these policies were Massachusetts contracts" and that "Massachusetts decisions would be controlling in the courts of New York and consequently in a common law action in the Southern District of New York, since it is the law of New York that contracts will be interpreted and enforced according to the law of the jurisdiction where the contract was made. *Klotz* v. *Angle*, 220 N. Y. 347, 355."

There was, therefore, "allegation" and "proof" (brief, 28) by petitioner itself that the contracts were governed by the

law of the State of Massachusetts, which the trial court found to be no different than that of the federal courts in admiralty. The fact that suit was brought in admiralty in the United States District Court for the Southern District of New York was for the purpose of convenience and has no possible legal significance as to the law to be applied other than the uniform rules of admiralty.

Moreover, as the point that the New York local law controlled under *Erie Railroad* v. *Tompkins* was not raised below, it should not now be heard on this petition. *Steam Tug Quickstep* v. *Byrne,* 9 Wall. 665; *Little* v. *Barreme,* 6 U. S. 170, 179; *Morrill* v. *Jones,* 106 U. S. 466; *De Rodriguez* v. *Vivoni,* 201 U. S. 371, 377.

(2) *Pezant* v. *National Insurance Co.*, 15 Wend. 543, does not establish New York law.

The *Pezant* case was decided by an intermediate appellate court and has never received approval or mention by the Court of Appeals of New York State. Moreover, it would appear to have been overruled, in so far as the alleged exception to the American 50% rule is concerned, by a subsequent case in the same court. See *American Ins. Co.* v. *Ogden,* 15 Wend. 532, discussed *supra,* p. 16.

(3) Admiralty having jurisdiction of the cause, the decisions of the courts sitting in admiralty are controlling, independent of the local law, whether statutory or set up by judicial decision. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Union Fish Co.* v. *Erickson,* 248 U. S. 308; *Northern Coal and Dock Co.* v. *Strand,* 278 U. S. 142; *John Baizley Iron Works* v. *Span,* 281 U. S. 222.

Policies of marine insurance are maritime contracts and it is as essential that they be interpreted according to the uniform principles of admiralty law as the contracts and liability of repairmen in *Baizley Iron Works* v. *Span, supra,* and stevedores in *Northern Coal and Dock Co.* v. *Strand, supra.*

The cause is not one of local concern and subject to local law, as is suggested by petitioner (brief, 32), but if it were, the applicable local law would be that of Massachusetts and not that of New York.

We deem it unnecessary to dwell at length upon petitioner's hypothetical argument that the doctrine of *Erie Railroad* v. *Tompkins* should be extended to require courts of admiralty to adopt the decisions of lower courts of the state where the admiralty forum is situated. It is sufficient to note that *Erie Railroad* v. *Tompkins* is founded upon the absence of constitutional authority for the establishment of a Federal common law. *Per contra,* the Constitution specifically provides for the establishment of a general and uniform system of maritime law administered by courts of admiralty. *The Lottawanna,* 21 Wall. 558; *Workman* v. *New York City,* 179 U. S. 552; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 216; *Union Fish Co.* v. *Erickson,* 244 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160.

Petitioner's effort to extend the doctrine of *Erie Railroad* v. *Tompkins* into the field of general maritime law overlooks the fundamental distinction between the two systems of law. Its argument that, because a state statute, granting a right of recovery for personal injuries, notwithstanding claimant's death, is enforceable in admiralty through a method of benevolent adoption (*Just* v. *Chambers,* 312 U. S. 383), a court of admiralty is therefore compelled to adopt the views of an inferior appellate state court in matters involving the general maritime law of marine insurance contracts, is a complete *non sequitur.*

The reason for the divergence between state and federal court decisions, cited by petitioner (brief, 31), is that courts of admiralty follow a uniform system, undisturbed by conflicting opinions of state courts in matters affecting contracts of marine insurance. The conflicts, cited by petitioner (brief, 30-31), clearly demonstrate the utter confusion and lack of uniformity which the general maritime law of marine insurance would suffer if courts of admiralty were compelled to follow divergent state court decisions.

FINAL POINT

Six federal judges in four separate hearings have found petitioner's arguments unsound. The petition presents no question of public importance or any other question requiring this Court to review the decision of the Circuit Court of Appeals and should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

New York, N. Y., September 11, 1942.

(Emphasis throughout ours unless otherwise noted.)

Form C (3-1-1934) Dated June 7th, 1938

In consideration of an additional premium of $ 360.00 being at the rate of 15% this endorsement is attached to and made part of Policy No. 8565 issued by the AETNA INSURANCE COMPANY, of the ÆTNA FIRE GROUP, Hartford, Connecticut.

Issued to R. C. Jeffcott

PROTECTION AND INDEMNITY CLAUSE

And we further agree that if the Assured shall by reason of his interest in the insured ship (or boat) become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses or shall become liable for any other loss arising from or occasioned by any of the following matters or things during the currency of this Policy in respect of the ship (or boat) hereby insured, that is to say:—

Property Damage (I) Loss of or damage to any other ship or boat or goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused proximately or otherwise by the ship (or boat) insured in so far as the same is not covered by the running down clause of the Hull Policy:

Loss of or damage to any goods, merchandise, freight or other things or interests whatsoever other than as aforesaid, whether on board said ship (or boat) or not, which may arise from any cause whatever:

Loss or damage to any harbor, dock (graving or otherwise), slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever, or to any goods or property in or on the same, howsoever caused:

Any attempted or actual raising, removal or destruction of the wreck of the insured ship or the cargo thereof, or any neglect or failure to raise, remove or destroy the same:

we will pay the Assured such proportion of such sum or sums so paid, or which may be required to indemnify the Assured for such loss, as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured; **provided** always that the amount recoverable hereunder in respect to any one accident or series of accidents arising out of the same event shall not exceed the sum hereby insured under this Policy on the Hull;

Personal Injury (II) Loss of life or personal injury and payments made on account of life salvage,

we will pay the Assured such proportion of such sums so paid or which may be required to indemnify the Assured for such loss as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured, **provided** always that the liability of this Company for claims on account of loss of life and/or personal injury and/or on account of life salvage is limited to its proportional part of $ 50,000. in respect to any one person and, subject to the same limit for each person, to its proportional part of $ 240,000. in respect to any one accident or series of accidents arising out of the same event.

Costs (III) And in case the liability of the Assured shall be contested in any suit or action, we will also pay our proportion of such ensuing costs as the Assured may incur with the consent in writing of two-thirds in amount of the underwriters.

Returns Clause (IV) Should this Policy be cancelled in accordance with its terms by the Assured or by this Company, return premium under this clause shall be computed as follows:

Where the Hull Policy to which this endorsement is attached provides for six (6) months navigation or less, and the premium has been paid, this Company shall return six per cent (6%) net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the working period and one per cent (1%) net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the layup period. Minimum premium to be retained Ten Dollars ($10.00).

Where the Hull Policy to which this endorsement is attached provides for more than six (6) months navigation, and the premium has been paid, this Company shall return three per cent (3%) net of the annual premium for every fifteen (15) consecutive days of the unexpired time. Minimum premium to be retained Ten Dollars ($10.00).

Notwithstanding the foregoing, this Policy is warranted free from any claim arising directly or indirectly under the Federal "Longshoremen's and Harbor Workers' Compensation Act."

Form H 9625 9-38 3M PRINTED IN U.S.A.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION INSURANCE

Assured R. C. Jeffcott

In consideration of a premium of $ 90.00 being at the rate of - - -

This Company agrees to insure

At and from noon of the 24th day of June, 19 38,

until noon of the 24th day of June, 19 39,

beginning and ending with noon, Eastern Standard TIME

Aux. Diesel Schooner "Dauntless"

unless sooner terminated as provided herein, the liability of the assured in respect of the yacht which shall arise under the Longshoremen's and Harbor Workers' Compensation Act being Public Act No. 803 of the 69th Congress, approved March 4th, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

The Company expressly reserves the right to cancel this Policy if the premium is not paid by the assured within sixty days after the attachment of this Policy by the mailing of the notices of such cancellation to the parties enumerated in Paragraph five (5) of this Endorsement and subject to the conditions of said Paragraph.

The Company will carry out the provisions of Section 35 of said Act. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

The Company agrees to abide by all the provisions of said Act and all lawful rules, regulations, orders and decisions of the United States Employees' Compensation Commission and of the Deputy Commissioner having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

This Policy shall not be cancelled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer. If this Policy be cancelled at the option of this Company pro rata rates will be charged, if at the request of the assured short rates will be charged. From all return premiums the same percentage of deduction (if any) shall be made as was allowed by this Company on receipt of original premium.

It is understood and agreed that this insurance fully covers the liability of the assured insuring under said Act but in no case does this insurance extend beyond the provisions of said Act.

It is agreed that upon payment of any loss, damage, or expense the Company is to be subrogated to all the rights of the assured to the extent of such payment.

This Policy is not assignable.

Attached to and forming part of Policy No. 8565, of the ÆTNA INSURANCE COMPANY, OF THE ÆTNA FIRE GROUP, Hartford, Connecticut.

Frank F. Byrd
Secretary

W. Ransom McCain
President

Dated June 7th, 1938 at Boston, Mass.

Form H 4908 Ed. May 28 9-38 m

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No. Y 8565

MARINE DEPARTMENT — YACHT POLICY

Ætna Insurance Company

HARTFORD, CONNECTICUT

240.00
Addl. 90.00
360.00

Amount Insured, $ 240,000. *Rate* 1 *Per Cent.* *Premium,* $ 2,400.00

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND

Of Twenty-four Hundred & 00/100 DOLLARS ($ 2,400.) PREMIUM,

Does Insure R. C. Jeffcott

To an Amount not exceeding Two Hundred Forty Thousand DOLLARS ($ 240,000.),

At and from June 24th, 19 38, at noon, to June 24th, 19 39, at noon, when this Policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed.

LARGE YACHTS

In name of R. C. Jeffcott *for account of whom it may concern.*

Loss, if any, payable to him

Do make insurance, and cause to be insured, lost or not lost,

For ($ 240,000.) Two Hundred Forty Thousand *Dollars,*

At and from June 24th, 1938 *Noon, Eastern Standard Time,*

To June 24th, 1939 " " " "

Upon the Hull, Spars, Sails, and all Tackle and Apparel, Materials, Fittings, Boats, including Launches of every description, Furniture, Fuel, Provisions, Stores, Supplies, Ordnance, Munitions, Artillery, Refrigerating and Electric Light Plants and Installation and all Machinery, Boilers, Engines, etc., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, are and shall be

valued at $ 240,000. of and/or in or on the Aux. Diesel Sch. Yacht "Dauntless" or by whatsoever other name or names the said yacht is or shall be named or called, beginning the adventure upon the said yacht, etc., as above, and shall so continue and endure during the period as aforesaid. Should

om strikes, riots, civil
e $ 240. is hereby charged.

upon the said yacht, etc., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel on the expiration of this Policy be at sea, or in distress, or at a port of refuge, or of call it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a *pro rata* monthly premium, and it shall be lawful for the said yacht, etc., to proceed and sail to and touch and stay at any Port or Places whatsoever and wheresoever without prejudice to this insurance.

TOUCHING the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas (It is understood and agreed that "sea" or "seas" where used in this form is intended and does include rivers, lakes and/or other inland waters), Fire, Pirates, Rovers, Assailing Thieves, Jettisons, Barratry of the Master and Mariners, and all other like perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns to sue, labor and travel for, in and about the defence, safeguard and recovery of the said vessel, etc., or any part thereof, without prejudice to this insurance; to the charges whereof the said Assurers will contribute according to the Rate and Quantity of the sum herein insured. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or assigns at and after the rate of one per cent.

To Return { .....percent net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period and arrival.
{ .....percent net for every fifteen (15) consecutive days of unexpired time of working period and
{ .....percent net for every fifteen (15) consecutive days of unexpired time of lay up period if this policy be cancelled—and arrival.

It is agreed that either party may cancel this policy by giving the other ten (10) days written notice in which event the assurers to return to the assured any unearned premium due under the rates of return provided above.

Particular average payable on the whole valuation if amounting to $ IRRESPECTIVE OF PERCENTAGE, or the ship be stranded, sunk, burnt, on fire or in collision.

In the event of this Policy beginning or ending, while the vessel is on course of a voyage, underwriters agree to pay their proportion of loss or damage sustained while the Policy is in force, provided the loss or damage sustained on the entire voyage would have been recoverable if the Policy had covered such voyage in its entirety.

As employment may offer, in port and at sea, in docks and graving docks, and on ways, slipways, railways, gridirons and pontoons, at all times, in all places and on all occasions, under steam or sail, with leave to sail with or without Pilots, to tow and to be towed, and to assist vessels and/or craft in all situations and to any extent, to render salvage services, and to go on trial trips. With liberty to discharge, exchange, and to take on board passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry stores etc., on deck or otherwise. With leave to dock, undock, and change docks as often as may be required, and to go on slipway or railway, gridiron and/or pontoons, etc., and to adjust companions.

In case of claim, repairs to be paid without deduction of "NEW FOR OLD," whether the average be particular or general.

General average and salvage charges payable in accordance with the Laws of the United States. And in the event of salvage, towage, or other assistance being rendered to the vessel hereby insured, by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessels) shall be ascertained by Arbitration in the same manner provided under the Collision Clause and the amount so far as applicable to the interest hereby insured, shall constitute a charge under this Policy. Warranted free of claim for wages and provisions in general average.

This insurance is to fully indemnify the assured for any and all charges and expenses applicable to the vessel, notwithstanding that the contributory value of the vessel be in excess of the value as agreed to herein.

In the event of total or constructive total loss, no claim to be made by the Underwriters for charter money or other earnings, whether notice of abandonment has been given or not. The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

Losses shall be payable in thirty days after proof of loss or damage covered by this Policy, and of the interest of the assured shall have been made and presented to this Company (the amount of premium on this policy, if unpaid, and all other indebtedness due this Company being first deducted).

It is understood and agreed that should any part of the Furniture, Tackle, Boats, or other property of this yacht be separated and laid up on shore during the period of this Policy, then this Policy shall cover the same against the risks of fire, explosion, tornado, windstorm and rising navigable waters only, to an amount not exceeding its proportion of $ 48,000.

Warranted by the assured that the within named vessel shall be laid up and out of commission at the Thames Ship Yard, New London, Connecticut during the currency of this policy.

Privilege to navigate coastwise and inland tributary waters between - - - - - - -

and - - - - - - - - both inclusive, during the currency of this Policy.

Warranted free from Capture, Seizure, Arrests, Restraints and Detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

Warranted free of loss or damage caused by strikers, locked out workmen, or persons taking part in labor disturbances, or riots, or civil commotions.

Warranted free of claim for any loss or damage occurring while the within insured vessel is engaged in any contraband or prohibited or illicit trade.

Warranted free from loss or damage to masts, spars or sails while racing.

And it is further agreed that if the vessel hereby insured shall come into collision with any other ship or vessel, and the Assured shall, in consequence thereof, become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the yacht hereby insured, we, the Assurers, will pay the Assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the yacht hereby insured. And in cases where the liability of the yacht has been contested with the consent, in writing, of a majority of the underwriters on the hull, etc. (in amount), we will also pay a like proportion of the cost thereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners of one or both of the vessels become limited by law, claims under the Collision Clause shall be settled on the principle of CROSS LIABILITIES as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision; and it is further agreed, that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners. And provisions of responsibility and extent of liability as between the two vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of Underwriters interested in each vessel; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

This insurance also to cover subject to the special terms of this Policy, loss of and/or damage to hull or machinery through the NEGLIGENCE of Master, Mariners, Engineers or Pilots, or through explosions, howsoever and wheresoever occurring, bursting of boilers, breaking of shafts, or through any LATENT DEFECT in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the Manager.

This insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of this Company.

Including all risks of default and/or error in judgment of master, mariners, engineers, pilots or crew.

It is hereby understood and agreed that personal negligence or fault of the assured in the actual navigation of the vessel, or his or their privity or knowledge in respect thereto, shall not relieve the assurers of liability under this policy or any endorsements attached hereto.

In event of any unintentional error in description of the vessel, or any deviation beyond the waters permitted by this policy, it is hereby agreed to hold the assured covered, provided notice be given this company so soon as known to the assured and additional premium be paid at rates of this company.

No suit or action on this Policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this Policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached; the latter being hereby waived.

WM. WALLACE & CO.
Boston

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Appendix A

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The within policy is extended to cover loss or damage to the within insured yacht resulting from collision and acts of person or persons of malicious intent at 10% and an additional premium of $

Warranted that the within insured vessel shall be used only for private pleasure purposes.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by a duly authorized Officer or Agent of the Company.

Frank F. Bunce
Secretary

W. Ransom McCain
President

Countersigned at Boston, Mass.

this 7th *day of* June, *19*38

L. W. Wallace Jr.
Agent

A STOCK COMPANY

YACHT POLICY

No. Y. 8565

INSURED

H. C. Jaffcott

Aux. Diesel Schooner "Dauntless"

Amount Insured, . . . $ ~~250~~ 200,000.

Rate, ... 1 %

Premium, ... $ 3,090.00

Expires June 24th, 19 39

MORE THAN A CENTURY OF SERVICE
ÆTNA INSURANCE CO.
HARTFORD, CONN.
INCORPORATED 1819 CHARTER PERPETUAL

THE ÆTNA FIRE GROUP

JOHN C. ALDEN

Form H 5052 Ed. May, 1936 PRINTED IN U.S.A.

Of Four Hundred & 00/100 Dollars ($ 400.00) Premium,

Does Insure R. C. Jeffcott

To an Amount not exceeding Eighty Thousand Dollars ($ 80,000.),

At and from June 24th, 19 38 at noon, to June 24th, 19 39., at noon, when this Policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed.

The within policy is extended by special conditions of this policy to cover loss or damage to the within insured Yacht resulting from strikes, riots, civil commotion and acts of person or persons of malicious intent at 5% and an additional premium of $40.00 is hereby charged.

In name of R. C. Jeffcott *for account of whom it may concern,*

Loss, if any, payable to him

Do make insurance and cause to be insured, lost or not lost,

At and from June 24th, 1938 noon, Eastern Standard Time

To June 24th, 1939 noon, Eastern Standard Time

On Disbursements and/or Ship Owner's Liability, as below of Aux. Diesal Schooner "Dauntless" for

$ - - - for $ 80,000.

or by whatsoever other name or names the said vessel is or shall be named or called, beginning the adventures upon the said interests, as above, and shall so continue and endure during the period as aforesaid. Should the above-mentioned vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge, or of call, said interests shall, provided previous notice be given to the Underwriters, be held covered at a *pro rata* monthly premium to said vessel's port of destination, and it shall be lawful for the said vessel, etc., to proceed and sail to and touch and stay at any ports or places whatsoever or wheresoever without prejudice to this insurance.

Disbursements.—Warranted free of all average and salvage charges being against the risk of the total or constructive total loss of vessel only. A total and/or constructive total loss paid by Underwriters on hull to be a total loss under this Policy.

Ship Owners' Liability.—This Policy is to pay its proportion of any sum or sums (not exceeding $ - - - or $ 80,000. in respect of any one collision) which the assured may be unable to recover under the "Collision Clause" as expressed in policies on hull and machinery valued at $ - - - or $ 240,000. by reason of that valuation. To pay also its proportion of such balance of General Average Claims, whether sacrifices and/or expenditures and/or sue and labor charges, and/or Claims for Salvage Charges as shall not be recoverable under policies on hull and machinery (for this purpose construing policies effected in America according to American law, and policies effected in Great Britain according to British law) by reason of the contributory value being greater than the insured value ($ - - - or $ 240,000.) less particular average, if any.

Touching the adventures and perils which we, the said assurers are contented to bear and take upon us, they are of the Seas (it is agreed that "seas" or "seas" where used in this form are intended and do include rivers, lakes and/or other inland waters), Men-of-War, Fire, Enemies, Pirates, Rovers Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what nation, condition or quality soever, Barratry of the Master and Mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said subject matter of this insurance, or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance. And it is expressly declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the interest insured, shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or his

assigns, at and after the rate of 1/2 per cent.

To return - - per cent. net for every 30 consecutive days the above vessel may be in port or in dock; during such period the said subject matter of this insurance being at the risk of the Underwriters—to return - - - per cent. net for every 30 days of unexpired time, if this policy be cancelled.

In port and at sea, in docks and graving docks, and on ways, slipways, railways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without Pilots, to tow and to be towed, and to assist vessels and/or craft in all situations and to any extent, to render salvage services, and to go on trial trips.

This insurance also to cover subject to the special terms of this Policy loss of and/or damage to hull or machinery through the negligence of Masters, Mariners, Engineers, or Pilots, or through explosions howsoever and wheresoever occurring, bursting of boilers, breaking of shafts or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the Manager. Master, Mates, Engineers, Pilots or Crew, not to be considered as part owners within the meaning of this clause should they hold shares in the vessel.

It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this Policy.

The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

In the event of any breach of warranty, unintentional error in description of voyages, cargo, trade, locality, date of sailing, or any deviation from the conditions of this Policy, it is agreed to hold the assured covered, premium to be arranged afterwards.

The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached; the latter being hereby waived.

warranted free from Capture, Seizure, Arrest, Restraint and detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

This slip is not to be attached to the Policy, and the assured has permission to detach it from the clauses above should the Policy have to be produced in a court of law. Applying to disbursements only.

The production of this Policy to be deemed sufficient proof of interest.

Without benefit of salvage.

2.

Appendix B

Warranted laid up and out of commission at the Thames Ship Yard, New London, Conn. during the currency of this policy.

Libellant's Exhibit 2

No. Y 8566

MARINE DEPARTMENT

YACHT POLICY

Aetna Insurance Company

HARTFORD, CONNECTICUT

Amount Insured, $ 80,000. *Rate* 1/2 *Per Cent.* *Premium,* $ Addl. 40.00 400.00

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND

Of Four Hundred & 00/100 DOLLARS ($ 400.00) PREMIUM,

Does Insure R. O. Jeffcott

To an Amount not exceeding Eighty Thousand DOLLARS ($ 80,000.),

At and from June 24th, 19 38 at noon, to June 24th, 19 39, at noon, when this Policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by a duly authorized Officer or Agent of the Company.

Frank F. Bush
Secretary

W. Russell Cain
President

Countersigned at Boston, Mass.

this 7th *day of* June, *19* 38

L. W. Wallace & Co. *Agent*

A STOCK COMPANY

YACHT POLICY

No. Y. 3566

INSURED

H. C. Jeffcott

Aux. Diesel Schooner "Dauntless"

Amount Insured, . . . $ 80,000.

Rate, ... 1/2 %

Premium, ... $ 440.00

Expires June 24th, 19 39

MORE THAN A CENTURY OF SERVICE
ÆTNA
INSURANCE CO.
HARTFORD, CONN.
INCORPORATED 1819 CHARTER PERPETUAL

THE ÆTNA FIRE GROUP

Form H 5051 Ed. May, 1936 PRINTED IN U.S.A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 335.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

ROBERT C. JEFFCOTT,

Respondent.

PETITIONER'S REPLY BRIEF.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

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Respondent.

PETITIONER'S REPLY BRIEF.

The respondent's brief in opposition to the petition for a writ of certiorari calls for a short reply.

POINT I.

Admiralty Jurisdiction.

Respondent's argument in regard to admiralty jurisdiction merely serves to emphasize the fact that never before in the long history of Article III, §2 of the Federal Constitution has any court held that admiralty has jurisdiction of a contract dealing with a vessel that was withdrawn from navigation, laid up and out of commission.*

---

*On page 9 of his brief, respondent says that in *Kilb* v. *Menke*, 121 F. (2d) 1013 (C. C. A. 5), the Court sustained admiralty jurisdiction of a libel for possession of vessels that had been tied up and out of commission for almost four years. He should have pointed out that when the action was commenced the vessels were in process of being put back in service. The Court, in its opinion, said:

"Admiralty jurisdiction, especially in possessory and petitory suits, exists only in respect of ships or vessels engaged in navigation or commerce * * *."

As petitioner pointed out below, as well as in its petition and brief herein, all federal courts heretofore (including the Circuit Court of Appeals for the Second Circuit) have uniformly and consistently observed the distinction between vessels engaged in navigation and vessels withdrawn from navigation. Contracts in regard to the former are maritime and therefore subject to admiralty jurisdiction: contracts in regard to the latter are not maritime and therefore not subject to admiralty jurisdiction.

The Circuit Court of Appeals brushes aside this distinction with the simple statement that it is "unreal" (R., p. 1936). This Court, however, in *Krauss Brothers* v. *Dimon S. S. Corp.*, 290 U. S. 117, 122, cited with approval the case of *Pillsbury Flour Mills Co.* v. *Interlake Steamship Co.*, 40 F. (2d) 439; Cert. denied, 282 U. S. 845, in which this same Circuit Court of Appeals, over the protest of the same counsel who represent the petitioner in this case, laid down in its most extreme form the very distinction which it now repudiates.

Possibly the Circuit Court of Appeals was right. It may perhaps be that the "distinction" which this and all other federal courts have heretofore drawn in construing Article III, §2 of the Constitution is "unreal" and should now be abandoned. It may be that the theory, heretofore universally accepted, that a contract can only be maritime when it deals directly with commerce and navigation is an outworn concept which should follow *Swift* v. *Tyson* into limbo. But if so, this Court and this Court only, should so determine. The case is obviously one in which certiorari should be granted.

POINT II.

The American rule in matters of constructive total loss.

Under Point II of his brief, respondent cites five cases, four in this Court and one in the Circuit Court of Appeals for the 7th Circuit, in support of the statement by the Court below that "the American rule is the moiety rule". In each of those cases the disaster occurred while the vessel was *on a voyage* and therefore absent from its destination or the port to which it was to return or at which it was to remain.

The *Pezant* case (15 Wend. 453) held that when a vessel, insured under a time policy, had arrived at or was in her port of destination, the 50% rule had no application, but that in such case the rule of indemnity applied and the owner could abandon only when the cost of recovery and repair exceeded her *total* value.

The rule of the *Pezant* case, as will be pointed out later, is clearly law in Massachusetts, as well as New York; and as *Phillips on Insurance* points out (§1555), is law generally in this country.

Whether the rule of the *Pezant* case is deemed an exception to the "American rule" or as a limitation or qualification of it, is immaterial. The 50% rule, always heretofore limited to cases of cargoes or vessels on voyages or in distant ports, is based on the wholly understandable theory that it is fair to shift from the owner to the underwriter the burden of going far afield to recover a vessel or cargo damaged to more than 50% of its value. The rule of the *Pezant* case, which merely applied to hull the rule universally followed in cargo cases, is based on the equally understandable doctrine that when a vessel is "at home" the owner cannot unjustly enrich

himself by recourse to the 50% rule—he can only abandon when the cost of recovery and repair exceeds the entire value of the vessel.

The case of *American Insurance Company* v. *Ogden* (15 Wend. 532; 20 Id. 287) is not in any way contrary to the *Pezant* case, as urged by respondent on pages 16-17 of his brief. On the contrary, the *Ogden* case strongly supports the rule laid down in the *Pezant* case. The *Ogden* case was not reversed "on other grounds" as suggested by respondent. One of the principal grounds of the reversal was the same ground on which Judge Bronson (who wrote the opinion in the *Pezant* case) dissented below, namely, that the events on which the assured based his claim for a constructive total loss occurred "in the port of destination, where at least he ought to have either funds or credit if not in other places". Of the three members of the Appellate Court who delivered opinions on appeal, two (including the Chancellor) specifically expressed their concurrence in the opinion of Judge Bronson below. The Chancellor called attention to the fact that the vessel "was in one of her regular ports of destination, with her cargo on board when she arrived in a disabled state"; and Senator Verplanck also refers to the fact that the loss occurred in a port of destination.

In attempted answer to petitioner's statement that the 50% rule, if applied to a case like the present, necessarily violates the fundamental concept that insurance is a contract of indemnity, the respondent (Brief, p. 19) merely quotes the statement of the House of Lords in *Irving* v. *Manning*, 1 H. L. C. 287, that a valued policy is not a perfect contract of indemnity. However, in the later case of *Rankin* v. *Porter*, 1873 L. R. 6 H. L. 83, 101-102, the House of Lords referred to—

> "* * * the cardinal principle of marine insurance, the principle of indemnity * * *."

The fact that perfection is unattainable is no ground for throwing "cardinal principles" to the winds. The decision below does just that.

POINT III.

Under *Erie Railroad* v. *Tompkins* and *Just* v. *Chambers*, the lower courts were bound to follow the state law.

(1)

The respondent says (Brief, pp. 21-22) that it is essential that marine insurance policies be uniformly construed according to the principles of admiralty law, and that accordingly *Erie Railroad* v. *Tompkins* has no application.

The decision of this Court in *Washburn & Moen Manufacturing Co.* v. *Reliance Marine Ins. Co.*, 179 U. S. 1, holds precisely the contrary. Marine insurance policies have *always* been construed according to state law, or, as in the *Washburn & Moen Manufacturing Co.* case, according to the federal "general commercial law". Suits on marine insurance policies are constantly brought in the state courts, and on the law side of the federal courts, and no case has ever held, nor so far as we can ascertain has it ever before been suggested, that marine insurance policies must be construed according to the uniform system of admiralty law as laid down in the federal courts (see cases cited on pp. 30 and 31 of our brief in support of the petition for certiorari). That being so, it follows that under *Erie Railroad* v. *Tompkins*, the law of *some* state must control here, for there is now no federal "general commercial law".

(2)

It is true, as respondent says (Brief, p. 20) that the petitioner argued below that Massachusetts law controlled. It is not true, however, that the rule of *Erie Railroad* v. *Tompkins* was not raised by petitioner in the court below. We quote as follows from pages 7 and 8 of the petitioner's brief in the Circuit Court of Appeals:

> "In a common law action in the Federal Court for the Southern District of New York, the law as established by the decisions of New York State would be controlling. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; *Fidelity Trust* v. *Field*, 311 U. S. 169, 177. • • •
>
> "Both the decisions of Judge Coxe and Judge Clancy appear to be contra to the decision of the United States Supreme in *Just et al.* v. *Chambers* (*The Friendship II*), 312 U. S. 383 (March 3, 1941), which held that 'a court of admiralty will recognize and enforce [the state law] when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation' (p. 388). The Supreme Court said further 'uniformity is required only when the essential features of an exclusive federal jurisdiction are involved' (p. 392). Certainly the interpretation of a Massachusetts contract of insurance on a vessel laid up in Connecticut is not a matter which affects 'the characteristic features of the maritime law' or 'the essential features of an exclusive federal jurisdiction'."

But the Circuit Court of Appeals rejected this argument. As the Circuit Court of Appeals devoted most of its discussion to the New York law, which it declined to follow, it evidently assumed (as pointed out on p. 28 of petitioner's principal brief) that New York law was the law which would apply, if the court were bound to follow

state law. In the petition and the supporting brief, we adopted this assumption of the Circuit Court of Appeals and argued that the court was bound by New York law, under *Erie Railroad v. Tompkins,* and that the New York law was as set forth in the *Pezant* case (15 Wend. 453). As the law of either New York or Massachusetts controls, and as the respondent now concedes that the policies were Massachusetts contracts, we wish to point out that the rule of the *Pezant* case is likewise law in Massachusetts. The courts below accordingly committed fundamental error, regardless of whether New York or Massachusetts law controlled.

In the *Pezant* case, the court, in rejecting the argument that the "50% rule" applied to a vessel which was "at destination", said (p. 460):

> "The case of *Wood* v. *Ins. Co.*, 6 Mass. 479, is, I think, an authority against the plaintiffs. That was an insurance on the ship for one year. On her way home she was stranded on rocks, and while in a perilous situation the owners offered to abandon, but the offer was not accepted. The vessel soon afterwards sunk, but she was weighed within a few days and brought to the wharf in her port of destination. The court held that stranding merely was not a sufficient ground for abandoning, and the plaintiff had, consequently, acquired nothing by the offer to abandon, while the vessel lay upon the rocks, before she sunk. And in relation to the subsequent rights of the parties, Ch. J. Parsons said: 'To enable the owner to abandon, there must be, at some period during the voyage, a total loss, either real or constructive; but in the present case no such loss has happened. The vessel has not been lost, nor has the voyage been defeated; but it appears that the voyage has, in fact, been performed; and that the vessel was in safety at her

> destined port.' He then observed, that it did not appear what degree of injury the vessel had sustained, and that the court could not presume 'that the injury was such as rendered her not worth repairing.' The plaintiff was only permitted to recover for a partial loss."

It has been uniformly held in Massachusetts that in the case of cargo there can be no abandonment for a constructive total loss where the cargo or a part of it reaches destination, unless the cost of recovering and reconditioning the cargo exceeds its *entire* value. The moiety or 50% rule has no application in such a case.

> *Forbes* v. *Manufacturers Insurance Co.*, 1 Gray (Mass.) 371, 375;
> *Pierce* v. *Columbian Insurance Co.*, 14 Allen (Mass.) 320, 322;
> *Parsons on Marine Insurance*, Vol. II, p. 159.

The rule in regard to abandonment for constructive total loss in cases of hull insurance grew out of the cargo rule (*Ruckman* v. *Merchants' Louisville Ins. Co.*, 5 Duer (N. Y.) 342, 362) and no court has ever suggested that any difference exists between hull and cargo in matters of constructive total loss.

Furthermore, Phillips, a Massachusetts lawyer, in his standard work on Insurance, says that the *Pezant* case states the law and represents the better view (*Phillips on Insurance*, §1555).

Accordingly it can be said with certainty that the rule of the *Pezant* case is the law of Massachusetts, as well as of New York. It was therefore binding on the courts below, under the doctrine of *Erie Railroad* v. *Tompkins*, regardless of whether the case was controlled by New York or Massachusetts law. The fact that the *Pezant*

case was decided by an "intermediate appellate court" is of course immaterial—

Fidelity Trust Co. v. *Field*, 311 U. S. 169;
Six Companies v. *Highway Dist.*, id. 180;
West v. *A. T. & T. Co.*, id. 223, 237-8.

Erie Railroad v. *Tompkins* held that it was intolerable to make the outcome of a case depend on the circumstance (accidental as far as one of the litigants was concerned) of whether the litigation was in the state or federal court. We suggest that it is equally intolerable to make the outcome of a case depend on the circumstances (accidental as far as the defendant or respondent is concerned) of whether the litigation is on the law or the admiralty side of the court.

The petitioner is not seeking (as the respondent erroneously states on p. 22 of his brief) to extend the doctrine of *Erie Railroad* v. *Tompkins* to the field of general maritime law. No court has ever held that marine insurance policies are within that field, and this court, in the *Washburn & Moen* case, held that they were not.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Proctors for Petitioner.

New York, N. Y., September 21, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 335

AETNA INSURANCE COMPANY,

Petitioner,

against

ROBERT C. JEFFCOTT,

Respondent.

RESPONDENT'S ANSWER TO PETITIONER'S REPLY BRIEF

GEORGE C. SPRAGUE,
JOHN THEIRY CARPENTER,
Counsel for Respondent.

The Keale Press — New York City

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Petitioner, in its reply brief (Point III 5-9), does an "about face" from the position taken by it in Point III of its main brief (28) and unequivocally states that "the Pezant case *is the law of Massachusetts as well as of New York*" (reply brief 8) for the mere reason that *Wood* v. *Ins. Co.*, 6 Mass. 479, was referred to and discussed in the Pezant opinion (*Pezant* v. *National Ins. Co.*, 15 Wend. 453). This is a complete *non sequitur*.

Wood v. *Insurance Co.*, supra, in no way supports the Pezant decision for it is based upon failure of proof that cost of repairs exceeded 50% of the vessel's value. The

vessel there involved was stranded upon the rocks during the insurance term, whereupon plaintiff immediately tendered abandonment to defendant underwriter which the latter refused to accept; the vessel was soon disengaged from the rocks, sank and thereafter was raised and brought to her port of destination where she was repaired by defendant underwriter and tendered to the plaintiff, who refused to accept her and sued, claiming a constructive total loss. There was a consent verdict for plaintiff for a total loss subject to the court's determination on the law and facts. The court set aside the verdict on the ground that there was no proof that cost of repairs exceeded "the half of her value" (482) or that "she received any essential injury by the accident, or that an attempt to weigh her and prepare for finishing her voyage would have been hazardous or very expensive", or that "no assistance, materials or workmen could be reasonably procured" (484-5). "It does not appear from the case, that the vessel was wholly repaired by the defendants; nor is it stated, *what degree of injury she sustained by the stranding. We cannot therefore presume that the injury was such, as rendered her not worth repairing*" (485).

Nor do the Massachusetts cases cited by petitioner (reply brief 8) support the decision in the *Pezant* case. *Forbes* v. *Manufacturers Ins. Co.*, 1 Gray 371, 375, and *Pierce* v. *Columbian Insurance Co.*, 14 Allen 320, 322, both *involved policies on cargo for specified voyages* where abandonment was not made until after completion of the voyage and discharge of the cargo from the ship and completion of the risk. They were decided upon the principle that an abandonment, to be effective, must be made promptly. In the *Pierce* case, supra, the court said:

> "The abandonment necessary to convert a constructive total loss into an actual total loss must be made promptly after receiving information, and, by our law,

is good or bad when made, and, if valid, immediately vests the rights of the parties. 3 Kent, Comm. 320, 324."[1]

Petitioner is incorrect in stating that "the law of either New York or Massachusetts controls" (reply brief 7). The controlling decisions are those of the courts sitting in admiralty where the cause was prosecuted. *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 313. To hold otherwise would prevent the court from applying its own jurisprudence in the decision of maritime questions properly before it. This Court has frequently held that, in cases of concurrent jurisdiction, the rights of the litigants depend upon the circumstance of whether the action is in admiralty or at law. *Atlee* v. *Packet*, 21 Wall. 389, 395; *The Max Morris* v. *Curry*, 137 U. S. 1. It is not "intolerable", as petitioner suggests (reply brief 9), that this should be so. The two jurisdictions are separate and distinct, each with a different history, heritage and jurisprudence.[2]

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[1] The Circuit Court of Appeals below observed: "A more likely explanation is that the court in the Pezant case was using an indirect approach to the rule that abandonment must be decided upon at the time the ship is in peril or reasonably soon thereafter" (R. 1939).

[2] The words omitted by petitioner in the footnote (reply brief 1) from the sentence quoted from *Kilb* v. *Menke*, 121 F. (2d) 1013, are most significant; they are: "* * * and not over hulks, or vessels that have been permanently taken out of such use" (1014). The *Dauntless* was not a "hulk", nor had she been "permanently taken out" of use as a vessel. The point that one (Markatana) of the two vessels involved in *Kilb* v. *Menke*, supra, had been towed to a new anchorage which was held to "put her back into service" was immaterial to the decision since the other vessel (Kalitan) was not so "towed", but remained moored in her original position "from Dec. 8, 1936 till Nov. 28, 1940 when seized under the warrant", and her inspection certificate authorizing her "use in navigation as a steam vessel" had expired July 7, 1939. The fact that the court sustained admiralty jurisdiction of the libel as to both vessels (Kalitan as well as Markatana) is clear proof that it placed no legal significance on the fact that the latter had been "put * * * back into service" while the former had not.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

New York, N. Y., October 3, 1942.

(Emphasis throughout ours)